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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 117.

EVELINE SCOTT, EXECUTRIX OF H. H. SCOTT, DECEASED, APPELLANT,

vs.

GEORGE H. ELLERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED SEPTEMBER 24, 1888.

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1 UNITED STATES OF AMERICA,
Southern District of Iowa, Eastern Division.

Pleas before the circuit court of the United States for the southern district of Iowa, eastern division, at a term thereof begun and holden at Keokuk, in said division, on the third Tuesday, to wit, Tuesday, the 21st day of June, A. D. 1887, before the Honorable J. M. Love, one of the judges of said court, being in the eighth judicial circuit.

GEORGE H. ELLERY, Complainant,
vs.
H. H. SCOTT, Defendant. } In Equity.

Be it remembered that heretofore, to wit, on the 10th day of December, A. D. 1883, a bill of complaint in equity was filed in the office of the clerk of the United States circuit court in and for the southern district of Iowa, eastern division, at Keokuk, in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Iowa.

GEORGE H. ELLERY, Complainant,
vs.
H. H. SCOTT, Defendant.

The Bill of Complaint of George H. Ellery against H. H. Scott, Defendant.

2 To the honorable judges of the circuit court of the United States within and for said circuit:

Your orator, George H. Ellery, a citizen and resident of the State of New Jersey, brings this his bill against H. H. Scott, a citizen and resident of the State of Iowa; and thereupon your orator complains and says—

That heretofore, on or about the 17th day of August, 1877, a cause was begun and instituted in the —— court of Des Moines county, Iowa, wherein the defendant, H. H. Scott, was complainant and your orator and others were defendants, to foreclose a certain deed of mortgage then owned or claimed to be owned by the defendant, H. H. Scott.

That afterwards, upon petition of complainant, said cause was removed into the circuit court of the United States, then held at Des Moines, in said State, where, on the 10th day of June, 1878, such proceedings were had that by the determination of said court a decree was duly entered wherein the court adjudged there to have been due to said H. H. Scott from the complainant the sum of $19,480.50 and costs, and said mortgage was foreclosed, and the real estate in said mortgage described was decreed to be sold as directed.

That afterwards, pursuant to said decree and by authority thereof, said real estate was sold, and the sum of ten thousand dollars credited upon said amount so adjudged to be due by said decree, said sale having been made and said credit allowed August 7th, 1878.

That on the 31st day of August, 1878, a petition of involuntary bankruptcy was filed by creditors against your complainant in the district court of the United States for the district of New Jersey, and such proceedings were had that on the first day of October, A. D. 1878, your orator was adjudged a bankrupt, and on the 23rd day of October all of his estate was duly vested in the assignee of said estate by the register's deed, as provided by law; and afterwards such other and further proceedings were had in the said bankruptcy matter that by the order and judgment of said court a certificate of discharge was issued to your orator, and he was then and there and thereby discharged from all debts and claims which were provable against his estate and which existed on the 31st day of Aug., 1878, the day on which said petition was filed; which said adjudication and discharge are in full force and effect and have never been vacated, annulled, or set aside, and to which, when produced, your orator begs leave to refer for greater certainty.

Your orator further says that the said H. H. Scott, defendant, had due and timely notice of the said proceedings, and while the same were pending, viz., on the 2nd day of January, 1879, filed proof of his said claim, a debt, as evidenced by said decree—that is to say, for the balance due thereon—and his said claim was allowed and filed with the clerk as provided by law.

Your orator further says that he is unlearned in the law, and he did not then know and is not now so advised or informed that it was a part of his duty in any manner to appear in the said circuit court after the entry of said final decree and plead the pendency of said bankruptcy proceedings after the adjournment of the term of court at which said decree was entered and the sale of said land made and proceeds credited upon said decree, and he is now advised that such was not necessary; but he avers that, notwithstanding the pendency of said bankruptcy proceedings and the said discharge, which were well known to defendant Scott, the said Scott, contriving and conspiring and intending to injure and oppress your orator and defeat and avoid the purpose and intent of the bankrupt act and the effect of said bankruptcy proceedings and to annoy and vex and harass your orator, appeared, by his solicitors, in said U. S. circuit court on the 15th day of May, 1879, and withholding from the court the facts of said bankruptcy proceedings and your orator's discharge, and that he had proved up his claim before the bankrupt court and moved the court, and by his acts and motion induced the court to enter a judgment against your orator for the sum of $10,436.42, with interests and costs, for the balance due on said decree, all of which was without any notice or rule upon your orator to show cause why said judgment should not be entered; and your orator had no knowledge that such motion would be made and no opportunity to oppose the same.

Your orator further states and shows that your orator had no

knowledge or information that the fact that said motion would be made or that said judgment had been ordered and entered and general execution authorized to issue until long after the same
5 was ordered, namely, until about the last of May, 1883, when your orator's attention was called to the publication of an original notice in a newspaper published in Iowa of a suit to enforce said judgment against certain real estate; and your orator charges that the said defendant is annoying and vexing your orator, has caused to be issued execution on said judgment, and has brought and is now prosecuting a suit against your orator to enforce said judgment.

That said judgment is an apparent lien and casts a cloud upon the title to any real estate in Iowa *to* which may be invested in your orator or which he may hereafter acquire, all of which is inequitable and against good conscience; and your orator charges, upon information and belief, that said judgment was obtained wrongfully and fraudulently, was entered inadvertently by mistake, and was and is in violation of the bankrupt act and should be vacated and set aside.

Your orator therefore prays that, by a decree of your honorable court, the said judgment for the balance of said final decree may be vacated, set aside, and held for naught, and the defendant may be enjoined from enforcing the same by process or otherwise, and that your orator may have such other and further relief in the premises as the nature of his cause and circumstances of his cause may require and to the court shall seem meet.

And may it please your honors to grant unto your orator a writ of subpœna of the United States, issuing out of and under the
6 seal of this honorable court, directed to the said H. H. Scott, defendant, commanding him, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against him; and your orator, as in duty bound, will ever pray.

(Signed) HALL & HUSTON,
HAGERMAN, McCRARY & HAGERMAN,
Solicitors for Complainant.

THE STATE OF IOWA, }
Des Moines County. }

I, Geo. H. Ellery, being duly sworn, do depose and say that I am the complainant named in the above and foregoing bill; that I have been made acquainted with the contents of the same, and that the statements therein contained so far as made as of knowledge are true, and so far as made as of information or belief I verily believe them to be true.

(Signed) GEORGE H. ELLERY.

Subscribed & sworn to by George H. Ellery before me Oct. 9th, 1883.

(Signed) E. S. HUSTON,
[SEAL.] *Notary Public.*

Endorsed: Filed December 10th, 1883. H. K. Love, clerk.

7 And afterwards, to wit, on the same day, to wit, the 10th day of December, A. D. 1883, an appearance was filed, which reads in words as follows, to wit:

I hereby enter my appearance in this cause and consent that the same may be heard at Keokuk, Iowa, reserving to myself all rights, including rights as to pleadings, times, &c., that I would have had if subpœna had been issued as prayed for in this bill and served in the usual and legal way.

(Signed) H. H. SCOTT, *Def't*,
By JOHN C. POWER, *Solicitor*.
H. SCOTT HOWELL & SON,
Of Counsel for Def't.

Afterwards, to wit, on the 18th day of February, A. D. 1884, an answer was filed in the aforesaid case, which answer reads in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } *ss*:
Southern District of Iowa, Eastern Division, }

On the Circuit Court of the United States in and for the Southern District of Iowa, Eastern Division.

GEORGE H. ELLERY, Complainant,
vs.
H. H. SCOTT, Defendant. } Answer in Equity.

8 The answer of H. H. Scott, the defendant to the bill of complaint of George H. Ellery, complainant.

This defendant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies and errors of the said bill, for answer thereto saith that the defendant admits the allegations of complainant's bill to be true in so far as it sets forth and alleges the residence and citizenship of George H. Ellery, complainant, and the residence and citizenship of H. H. Scott, the respondent. He admits that on or about the 19th day of August, 1877, an action was begun and instituted in —— court of Des Moines county, Iowa, wherein the defendant, H. H. Scott, was complainant and George H. Ellery, the complainant herein, was defendant, to foreclose a mortgage owned by defendant, H. H. Scott.

That afterwards, as alleged, the said cause was removed, upon complainant's petition, into the circuit court of the United States held at Des Moines, Iowa, and that on or about the 10th day of June, 1878, said cause was duly determined by said court and a decree had and duly entered wherein the court adjudged there to have been due to said H. H. Scott from complainant the sum of $19,480.50 and costs, and the said mortgage was ordered to be foreclosed and the real estate described therein to be sold as directed by said decree.

That afterwards said real estate was sold, and the sum of $10,000.00

was realized from said sale. All the above, which is alleged and set forth in complainant's bill, the defendant admits to be true.

9 The defendant is informed that on or about the 31st day of August, 1878, a petition of involuntary bankruptcy was filed by creditors against George W. Ellery, complainant, in the United States district court of New Jersey, but of such fact the defendant has not sufficient knowledge or information to form a belief, and therefore calls for proof. Your defendant is further informed that on or about the 1st day of October, 1878, the said complainant was declared by said court a bankrupt and his estate was transferred to an assignee to be distributed, as provided by law; but of this fact also he has not knowledge or information to form a belief, and therefore calls for proof.

The defendant has no sufficient knowledge or information to form a belief that the complainant ever received his discharge in bankruptcy from all his debts which existed on the 31 day of August, 1878, or at any other time, and therefore denies that complainant ever did receive such discharge and calls for strict proof.

The defendant admits it to be true that on or about the 15th day of May, 1879, he appeared, by his solicitor, before the said United States circuit court at Des Moines, at the next regular session or term after which said decree was rendered, and such proceedings were on that day had that a judgment for the sum of $10,436.42, with interest and costs, was rendered and entered against said complainant. He admits that this amount, $10,436.42, with interest, was the balance which remained unpaid of the sum which

10 the decree above referred to, rendered and entered on the 10 day of June, 1878—namely, 19,480.50—found and adjudged to be due defendant from complainant.

That 10,000.00 was realized from the foreclosure sale which was ordered in said decree, and that said sale was confirmed and a credit of $10,000.00 was allowed complainant on the amount which was found due from complainant to defendant by said decree.

That it was this unpaid balance of the amount adjudged by the said decree to be due defendant which remained after allowing the $10,000.00 credit upon which the defendant, on the said 15 day of May, 1879, recovered the said judgment for $10,436.42, with interest and costs.

But the defendant denies the allegations that complainant did not have notice of the proceedings in which the said judgment for $10,436.42 was rendered, and avers that the complainant had due and sufficient legal notice of said proceedings, and that complainant, if he ever received a discharge in bankruptcy, it was before the 15th day of May, 1879, and at the time said judgment was rendered against him, having due and legal notice of the proceedings, he failed to appear and plead same, and therefore he has waived such defense to complainant'- claim, or, if such defense was made, it was considered and determined adversely to complainant.

The defendant further avers that the said judgment was duly rendered and entered by a court that had competent jurisdiction

11 over the subject-matter and the parties, and if complainant

had any defense to the cause upon which said judgment was rendered he waived same by not appearing and pleading it.

The defendant denies that said judgment was obtained wrongfully or fraudulently or was entered inadvertently by mistake.

He denies that he or his solicitor imposed upon the court, and by misrepresentations induced the court to enter a judgment wrongfully against said complainant, and states that all the facts necessary to determine the rights of the parties were before the court when said judgment was rendered.

He denies said judgment was obtained with the intention to wrongfully annoy and unjustly vex the complainant, and that same defeats and avoids the purpose and intent of the bankrupt act.

He denies that the proceedings which he has commenced to enforce said judgment against the complainant and the execution issued therein are brought for the purpose of wrongfully or illegally harassing or annoying the complainant, but for the purpose of enforcing and collecting the said judgment obtained, as above set forth.

And the defendant, having herein answer- and denied the allegations of complainant'- bill, and denying that the judgment, the collection of which complainant seeks to enjoin and to have declared null and void and seeks to have vacated and set aside, *it* was obtained by fraud or imposition on the court or was entered
12 inadvertently or by mistake, avers that said judgment was rightfully and legally obtained and same has never been vacated, annulled, or set aside, and the same is a lien on all real estate that the complainant may have in the district in which it was rendered or recorded; and all of which matter and things the defendant is ready to maintain and prove as this honorable court shall direct, and humbly prays that complainant's bill be dismissed and that he be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) JOHN C. POWER AND
H. SCOTT HOWELL & SON,
Solicitors for the Defendant.

STATE OF IOWA, }
Des Moines County, } *ss:*

I, H. H. Scott, being duly sworn, do depose and say that I have read the foregoing answer, and all the allegations therein stated I verily believe to be true, as I am informed and believe.

(Signed) HENRY H. SCOTT.

Subscribed and sworn to before me by the said Henry H. Scott this 16th day of February, A. D. 1884.

(Signed) LA MONTE COWLES,
[SEAL.] *Notary Public, Des Moines County.*

Endorsed: Filed Feb'y 18th, 1884. H. K. Love, clerk.

13 In the Circuit Court of the United States, Southern District of Iowa, Eastern Division, at Keokuk.

GEORGE H. ELLERY
vs.
H. H. SCOTT. } In Equity.

Exceptions of Complainant to the Answer of Defendant.

Complainant, George H. Ellery, excepts to the answer of the defendant and to the parts hereinafter referred to and set out for the reasons herein stated; thereupon complainant files the following exceptions:

1st. Complainant excepts to the answer as insufficient, because it fails to answer the allegations of the complainant's bill found on pages 2 and 3, and in words and figures as follows: "Your orator further says that said H. H. Scott, defendant, had due and timely notice of the said proceedings, and while the same were pending, viz., on the 2nd day of January, 1879, filed proof of his said claim and debts, as evidenced by said decree—that is to say, for the balance due thereon, and his said claim was allowed and filed with the clerk as provided by law."

2nd. Complainant further excepts to the answer, and especially to that part found on page 12, in words and figures as follows: "But defendant denies the allegation that complainant did not have notice of the proceedings in which the said judgment was rendered, and avers that the complainant had due and sufficient legal notice of said proceedings, and that the complainant, if he
14 ever received a discharge in bankruptcy, it was before the 15th day of May, 1879, and at the time the said judgment was rendered against him, having had due and legal notice of the proceedings, failed to appear and plead same, and therefore he has waived such defense to the complainant's claim, or if such defence was made it was considered and determined adversely to complainant." And for cause of such exception shows that same is insufficient and states that it fails to state the facts as to notice or what kind of notice was given, or if written notice was given to set same out.

(Signed) HALL & HOUSTON,
HAGERMAN, McCRARY & HAGERMAN,
Solicitors for Complainant.

JAMES HAGERMAN, *Of Counsel.*

Endorsed: Filed June 2, 1884. H. K. Love, clerk.

Afterwards, to wit, on the 31st day of January, A. D. 1885, an order of reference was made and entered in said cause, and which reads in wo-ds and figures following, to wit:

GEO. H. ELLERY
vs.
H. H. SCOTT. } Equitable.

This cause coming on for hearing on the exceptions of complain-

ant to the answer of defendant, the parties appeared by counsel, and the court, being fully advised in the premises, doth order
15 said exceptions be, and same are hereby, referred to the master in chancery, P. T. Lomax, for hearing and determination and to make report of same to this court, according to course in equity.

Jan'y 31st, 1885.

SOUTHERN DISTRICT OF IOWA, } ss:
Eastern Division, }

I, H. K. Love, clerk of the United States circuit court for said division and district, do hereby certify the above to be a true copy of the order of reference made and entered in the foregoing-entitled cause.

Witness my hand and official seal of office, at Keokuk, this 31st day of January, A. D. 1885.

(Signed) H. K. LOVE, *Clerk*,
[SEAL.] By ERIE J. LEECH, *Deputy*.

And afterwards, to wit, on the 4th day of March, 1885, the master in chancery files his report in pursuance of said order of reference, and — reads in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the Southern District of Iowa, Eastern Division.

GEORGE H. ELLERY
vs. } In Equity.
H. H. SCOTT.

16 MASTER'S OFFICE, *March 3rd*, 1885.

To the honorable judges of said court:

In pursuance of an order of reference made in the above-entitled cause, bearing date January 31st, 1885, a copy of which is hereto annexed, I, the undersigned master, to whom said matter was therein referred, beg leave respectfully to report—

That having appointed Thursday, February 19th, 1885, at my office in the city of Keokuk, at 10 o'clock a. m., to hear said matter, I was then and there attended by Hagerman, McCrary & Hagerman, solicitors for complainant, and by Howell & Son, solicitors for respondent, and, the pleadings in the cause having been submitted, the matter was argued by counsel.

It was, on the part of respondent, contended that the respondent not having submitted to the complainant's exception, filed at June rules, 1884, to respondent's answer, and respondent not having filed an amended answer on the rule day next succeeding, and complainant not having on that rule day set down said exceptions for hearing at the next succeeding rule day, that thereby the said exceptions were to be deemed abandoned under the terms of equity rule No. 63, as to which contention I held that said objection was one which

it is presumable the court considered at the time the order of reference was made, when the respondent had an opportunity to present and should have presented this objection, and that this action of the court precludes the master from now considering said objection.

17 Thereupon, having looked into the complainant's bill in this cause, the respondent's answer, and complainant's exceptions taken thereto for insufficiency, I am of opinion and accordingly find that the said exceptions are well taken, and the answer is insufficient in the matters thereof, respectively.

All of which I humbly certify.

(Signed) P. T. LOMAX,
Master in Chancery.

Endorsed: Filed March 4th, 1885. H. K. Love, clerk.

Afterwards, on the 16th day of March, 1885, the defendant filed his exceptions to the report of the master in chancery, and which reads in words and figures as follows:

In the Circuit Court of the United States, Southern District of Iowa, Eastern Division.

GEO. H. ELLERY *vs.* H. H. SCOTT. } In Equity.

Now comes the defendant in the above-entitled cause and makes exceptions to the report of the master in chancery of this court, to whom this cause was referred, to hear and determine the exceptions filed by the plaintiff to the answer of defendant for insufficiency and to report his conclusions as to same, which order bears date January 31, 1885, and which report, executed in compliance with said order, bears date on the 4th day of March, 1885—

18 For that the said master has held that the plaintiff has not waived and abandoned his said exception for insufficiency to answer of defendant, for that the said answer was not amended, nor was the exception set down for hearing at the next rule day, nor was leave of court granted for an extension of time to set said exceptions down for hearing.

For that the said master has held the answer of defendant to be insufficient as excepted to by the plaintiff.

W-ereas the said master should have held that plaintiff had abandoned his exceptions by not setting same down for hearing, and that he should have held that he could not hear and determine same, as same were never set down for hearing.

And the master should have held that as to each of the allegations in compl't's bill which compl't excepts to as not being fully answered by def't, that the same were answered as fully as the court doth require in their answer filed in this cause and excepted to.

Wherefore the defendant excepts to the said report, and asks the judgment of the court thereon.

(Signed) H. SCOTT HOWELL & SON,
Solicitors for Defendant.

Endorsed: Filed March 16, 1885. H. K. Love, clerk.

19 Afterwards, to wit, at a term of the United States circuit court in and for the southern district of Iowa, eastern division, begun and held at Keokuk on the third Tuesday of June, to wit, Tuesday, the 16th day of June, A. D. 1885, the following, among other, proceedings were had, and which reads in words and figures as follows, to wit:

GEORGE H. ELLERY
vs.
H. H. SCOTT. } Equity.

It is ordered that the defendant pay the costs of reference to the master in exceptions to the answer and the costs of exception to the master's report in ten days of this date.

Friday morning, July 3rd, 1885.

Afterwards, on the 6th day of July, 1885, the defendant filed his amended answer to the bill of complaint, and which reads in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Southern District of Iowa, Eastern Division.

In the Circuit Court of the United States in and for the Southern District of Iowa, Eastern Division.

GEORGE H. ELLERY, Complainant,
against
H. H. SCOTT, Defendant. } Amended Answer. In Equity.

20 *The Amended Answer of H. H. Scott, the Defendant, to the Bill of Complaint of George H. Ellery, Complainant.*

This defendant, saving and reserving to himself all and all manner of advantage of exceptions to the manifold insufficiencies and errors of said bill, for answer thereto saith—

That the defendant admits the allegations of complainant's bill to be true in so far as it sets forth and alleges the residence and citizenship of George H. Ellery and the residence and citizenship of H. H. Scott.

He admits that on or about the 17th day of August, 1877, an action was begun and instituted in the court of Des Moines county, Iowa, wherein the respondent, H. H. Scott, was complainant and George H. Ellery, the complainant herein, was a defendant, to foreclose a mortgage owned by your respondent, H. H. Scott.

That afterwards, as alleged, the said cause was removed upon the

complainant's petition to the circuit court of the United States held at Des Moines, Iowa.

That on or about the 10th day of June, 1878, said cause came on for trial and a decree was had, signed and duly entered of record, wherein the court adjudged them to have been due to said H. H. Scott from Geo. H. Ellery the sum of $19,480.50, together with $500.00 for attorneys' fees, and the costs of that suit, taxed at — dollars, and the said mortgage was ordered to be foreclosed and the real estate described in said mortgage and bill to be sold as directed by said decree, and by further order of the said decree it was
21 ordered "that this cause do stand continued until the execution of this decree and the further order of this court."

That afterwards said real estate was sold, and the sum of ten thousand dollars ($10,000.00) was realized from said sale, as is alleged in complainant's bill.

The defendant is informed that on or about the 31st day of August, 1878, a petition of involuntary bankruptcy was filed by creditors against Geo. H. Ellery, compl't, in the United States district court of New Jersey; but of such fact the defendant has not sufficient knowledge or information to form a belief, and therefore calls for proof.

The defendant is informed that on or about the 1st day of October, 1878, the said Geo. H. Ellery was declared by said district court a bankrupt, and his estate was transferred to an assignee in bankruptcy to be distributed as provided by law; but of this fact also he has not sufficient information or knowledge to form a belief, and therefore calls for proof, and avers that no dividend was ever paid out of said estate by said assignee.

The defendant has no sufficient information or knowledge to form a belief that the complainant ever received a discharge in bankruptcy from all his debts which existed on the 31st day of August, 1878, or at any other time, and therefore denies that said complainant ever did receive such discharge and calls for strict proof.

The defendant denies that on the 2nd day of January, 1879,
22 he filed proof of his said claim, a debt as evidenced by said decree.

The defendant admits it to be true that on or about the 15th day of May, 1879, he appeared by his solicitor before the said circuit court held at Des Moines, Iowa, at the next regular session or term of said court after the sale of said land and the approval of the master's report who made the sale: and such proceedings were on that day had whereby under the rules of said court the defendant herein obtained a decree of said court in which there was found to be due the said H. H. Scott from Geo. H. Ellery the sum of ten thousand four hundred and thirty-six & $\frac{42}{100}$ dollars, with 10 per cent. interest from date of master's report.

He admits that this amount, $10,436\frac{42}{100}$, was the balance which remained unpaid of the sum which the decree above referred to, rendered and entered on the 10th day of June, 1878, found and adjudged to be due defendant Scott from Geo. H. Ellery, the complainant herein.

That $10,000.00 was realized from the foreclosure sale which was ordered in said decree, and that said sale was confirmed by said circuit court and a credit of $10,000 was allowed complainant on the amount which was found due the defendant herein by said decree.

That it was this unpaid balance of the amount adjudged by the said — to be due defendant which remained unpaid after allowing the credit of $10,000, for which the defendant, on the 15th day of May, 1879, recovered the said decree.

23 But the defendant denies that the complainant did not have notice of the proceedings in which the said decree for $10,436.42 was rendered, and avers that the complainant did have due and timely notice of said proceedings, in this, that the complainants was duly served with original notice, according to the law of the State of Iowa, of the commencement of the foreclosure suit in the — court of Des Moines county, Iowa; that he entered his appearance in said cause and removed same to the United States circuit court at Des Moines, and in this, that when the said decree of date June 10th, 1878, was rendered that cause was, by the orders of the court, continued for the execution of the decree and the further order of the court.

Defendant avers that if the complainant ever did receive a discharge in bankruptcy it was prior to the 15th day of May, A. D. 1879, and prior to the rendering of the said decree for the balance of $10,436.42 found due over and above the proceeds of the sale, and the complainant, if he ever did receive a discharge in bankruptcy, failed to appear and plead same and has therefore waived such defense, or if such defense was made it was considered and determined adversely to the complainant.

He further avers that the said decree of date May 15th, 1879, was duly rendered and entered by a court of competent jurisdiction over the subject-matter and the parties, and if the complainant had any defense to the cause upon which said decree was rendered he waived same by not appearing and pleading same.

24 The defendant denies that said judgment was obtained wrongfully or fraudulently or was entered inadvertently by mistake.

He denies that he or his solicitor imposed upon the court or by any misrepresentations obtained the said decree.

He denies that said decree was obtained with the intention to wrongfully annoy or unjustly vex the complainant, and that same defeats or avoids the purpose and intent of the bankrupt act.

And the defendant, having herein answered and denied the allegations of complainant's bill, and denying that the decree which complainant seeks to have set aside and vacated and be declared null and void was obtained by fraud or imposition on the court or was entered inadvertently or by mistake, avers that said decree was rightfully and legally obtained, and same has never been vacated, annulled, or set aside, and same is a lien on all real estate that the complainant may have in the district in which it was rendered or recorded; and all of which matters and things the defendant is

ready to maintain and prove as this honorable court may direct, and he humbly prays that complainant's bill be dismissed and that he be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) JOHN C. POWER AND
H. SCOTT HOWELL & SON,
Solicitors for Def't.

25 STATE OF IOWA, } ss:
Lee County, }

I, H. H. Scott, being duly sworn, do depose and say that I have heard read the foregoing amended answer, and the allegations contained therein are true, as I verily believe.

(Signed) HENRY H. SCOTT.

Subscribed and sworn to before me this 3rd day of July, 1885.

(Signed) JOHN C. POWER,
[SEAL.] *Notary Public, Des Moines Co., Iowa.*

Endorsed: Filed July 6th, 1885. H. K. Love, clerk.

And afterwards, to wit; on the 3rd day of August, 1885, the complainant filed his replication to the answer of defendant, and which reads in words and figures as follows, to wit:

In the Circuit Court of the United States, Southern District of Iowa, Eastern Division.

GEO. H. ELLERY } In Equity.
vs.
H. H. SCOTT. }

The replication of George H. Ellery, the complainant, to the answer of H. H. *Ellery*, defendant.

This repliant, saving and reserving unto himself all and all
26 manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and approve his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material, or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver and approve as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

(Signed) HALL & HUSTON,
HAGERMAM, McCRARY & HAGERMAN,
Solicitors for Complainant.

JAMES HAGERMAN, *Of Counsel.*

Endorsed: Filed August 3rd, 1885. H. K. Love, clerk.

Afterwards, to wit, on the 22nd day of June, 1886, an agreed statement of facts and proofs was filed, and which reads in words and figures following, to wit:

In the United States Circuit Court for the Southern District of Iowa, Eastern Division.

GEO. H. ELLERY, Compl'nt,
vs.
H. H. SCOTT, Respondent.

Agreed Statement of Facts.

27 1. The complainant is now, was at the commencement of and ever since August 17, 1877, has been a resident and citizen of the State of New Jersey, and the respondent is now, was at the commencement of and ever since August 17, 1877, has been a citizen and resident of the State of Iowa, Des Moines county.

2. Respondent, on or about the 17th day of August, 1877, instituted his suit in the district court of Des Moines county, Iowa, against said Geo. H. Ellery to foreclose a certain mortgage of said Ellery to respondent on lands in Des Moines county, Iowa, and to obtain a decree for the sale of the mortgaged premises and a judgment against him; that due and legal notice of said suit was had and made upon said Geo. H. Ellery; that said Ellery appeared in said district court of Des Moines county, Iowa, and by his counsel asked for and obtained the removal of said cause into the circuit court of the United States for what was then known as the southern division of Iowa, sitting at Des Moines, wherein the cause was further prosecuted and such proceedings were therein afterwards had as that on the 10th day of June, 1878, a decree was duly had and entered by said United States circuit court foreclosing said mortgage and finding and adjudging the sum of $19,480.50 costs to be due from said Ellery to said Scott and directing said mortgaged premises to be sold to pay said sum and ordering said cause to stand continued (on the docket of said circuit court) until the execution of this said decree and the further orders of this (said) court.

28 Said decree is hereby referred to and made a part of this statement, being attached hereto, marked Exhibit "A."

3. That afterwards the said mortgaged premises were duly sold by the master in chancery of said court, under said decree, for the sum of $10,000.00, and said sale was duly confirmed on November 4th, 1878, and the said sum of $10,000 was credited on the amount found due by said decree.

4. That on the 31st day of August, 1878, a petition of involuntary bankruptcy was filed against said Ellery by some of his creditors, not including the said Scott, in the district court for the district *court* of New Jersey, and said proceedings were afterwards therein had as that on the 1st day of October, 1878, the said Ellery was duly adjudged a bankrupt, and on the 23rd day of October, 1878, his estate was duly conveyed by the register in bankruptcy to the assignee in the usual manner.

5. That on or about the 27th day of January, 1879, said Scott filed with the register in bankruptcy in said district court of the United States for the district of New Jersey his proof of debt against the estate of said Ellery, bankrupt, based upon the decree of foreclosure above referred to, after allowing the said credit of $10,000 realized by the sale of the mortgaged premises, the balance of said claim so proved being $10,436.42.

A certified copy of said claim and the proof made thereof is hereto attached and is made a part of this statement.

6. That the proceedings in bankruptcy against said Ellery were duly prosecuted and on the 25 day of Feb., 1879, said Ellery was granted by said district court of the United States for the district of New Jersey a certificate of discharge in bankruptcy, a copy of which is hereto attached and made a part of this statement as Exhibit "B." But no dividend was ever allowed or paid by the assignee of said Ellery out of his estate on any claim filed therein and said Scott had no actual notice of said discharge in bankruptcy.

7. That in open court at the next regular term of the United States circuit court for the district of Iowa, at Des Moines, after the confirmation of the sale of the mortgaged premises, to wit, on or about the 15th day of May, A. D. 1879, the said Scott appeared by his counsel in said court, and such further proceedings were had in said cause whereby, under the rules of said court, the said Scott obtained a decree against the said Ellery for the sum of $10,436.42, being for the balance of the decree above referred to which remained unsatisfied by the sale of the mortgaged premises. A copy of such decree is attached hereto, marked Exhibit "C," and made part hereof. No new notice was served upon said Ellery or his counsel by said Scott or for him, nor was any notice published, or his counsel would apply for said decree.

8. The said Scott had no knowledge of the discharge in bankruptcy of the said Ellery until long after the rendering of said decree, except such notice as may by law be implied or inferred from the facts and proceedings herein stated and set out, and the said Ellery had no actual knowledge that said decree had been rendered against him until about the last of May, 1883; nor did he have any knowledge that such a decree would be asked except such as might be inferred from the pendency of the proceedings and the orders and rules of court.

9. Now, if upon a final hearing before the court upon all the pleadings and the facts above stated and the exhibits and proofs to be presented to the court the court shall be of the opinion that the complainant is entitled to the relief prayed for, then a decree may be entered cancelling and setting aside the said decree rendered May 15, 1879, in favor of respondent against said complainant, with such instructions to the clerk of this court for the central division, setting at Des Moines, to enter the same upon his records there as to this court shall seem proper; but if this court, upon such final hearing, shall be of the opinion that the complainant is not entitled to the relief prayed for, then a decree may be entered dismissing the complainant's bill with costs. This admission is to be filed with the

case, the same as if depositions had been taken and filed, proving the facts as herein admitted, and nothing herein shall preclude either party from introducing such other testimony as may be proper or taking such depositions as they desire.

(Signed) HALL & HUSTON,
HAGERMAN, McCRARY & HAGERMAN,
For Complainant.

JOHN C. POWER &
H. SCOTT HOWELL & SON,
Solicitors for Defendant.

31 In United States Circuit Court, Southern Dist. Iowa, Eastern Division.

GEORGE H. ELLERY, Compl't,
vs.
HENRY H. SCOTT, Def't.

Stipulation.

It is hereby stipulated and agreed that compl't shall have until Jan'y 1st, 1886, to take and file such evidence in the above-entitled cause as he may desire, the defendant to have till Jan. 15, 1886, to take and file any further evidence he may desire, and compl't to file evidence in rebuttal by the first day of the Jan'y term, and the cause shall be submitted at that term, subject, however, to this modification, that if either party desires evidence which cannot be had in the time named, then the time may be extended in the discretion of the court.

(Signed) HALL & HUSTON &
McCRARY & HAGERMAN,
For Complainant.
JOHN C. POWER &
H. SCOTT HOWELL & SON,
For Defendant.

EXHIBIT "A."

United States Circuit Court, District of Iowa, May Term, 1878.

HENRY H. SCOTT, Complainant,
vs.
GEORGE H. ELLERY and CORNELIA ELLERY. } No. 1010, Equity.

MONDAY, *June 10th*, 1878.

32 And now, on this 10th day of June, 1878, this cause came on to be heard upon the default of the respondents, George H. Ellery and Cornelia Ellery, heretofore entered, and upon the report of E. R. Mason, Esq., master of this court, to whom it was referred to ascertain and report the amount due to the complainant from the respondent George H. Ellery upon the note and mortgage mentioned and described in the complainant's bill of complaint, which report bears date the 29th day of May, 1878, the complain-

ant appearing by P. Henry Smythe and C. B. Harrington, his solicitors in this cause, and the said respondents appearing not, but still being in default;

And the court having heard the report of the said master and being now fully advised in the premises—

It is ordered, adjudged, and decreed and this court doth order, adjudge, and decree that the said respondent George H. Ellery pay to the said complainant in this cause on or before the 20th day of June, 1878, the sum of nineteen thousand four hundred and eighty and $\frac{55}{100}$ dollars, with interest at the rate of 10 per cent. per annum, and the further sum of five hundred dollars, solicitors' fees allowed complainant, and the costs of this suit, taxed at $—. In default of such payment it is further ordered, Monday, June 10th, 1878, adjudged, and decreed that the lands described in the mortgage recited in the complainant's bill of complaint, which bears*d* date March 1st, 1873, and is recorded in the
33 office for recording deeds in and for the county of Des Moines, in the State of Iowa, in Book No. 23, on page 164 *et seq.*; which said lands are in the said mortgage described as follows, viz: All the following-described real estate, situate in Des Moines county and State of Iowa, to wit: Beginning at the southwest corner of the northwest quarter of section No. eight (8), in tp. sixty-nine (69) north of range No. two (2) west and running thence north ten (10) chains and 55 links to a stone; thence east twenty-eight (28) chains and 8 links to a stone; thence south 5° 55′ west twenty-two (22) chains and 88 links to a stone; thence N. 86° 55′ W. twenty-five (25) chains and 80 links to a stone, and thence north ten (10) chains and 97 links to place of beginning, except lots 1, 2, 3, 4, 5, 18, 32, and 33 in Hopkins' subdivision of a part of said tract, the tract hereby conveyed containing fifty-five (55) acres and 46 hundredths of an acre, according to a survey made by Steyel, surveyor, in Feb'y, 1873;

Also lot No. one (1), as set off to Mary A. and J. L. Urban in partition suit *vs.* C. D. Worrell *et al.*, Nov. 28th, 1856, being part E. $\frac{1}{2}$ sec. 7, tp. 69 N., range 2 west, containing twelve (12) and 4 hundredths acres; also lot No. two (2), in lot No. two (2) as set off to Mary A. and J. L. Urban in partition suit *vs.* C. D. Worrell *et al.* by decree dated August 1st, 1857, being part E. $\frac{1}{2}$ sect. 7, twp. 69 N., range 2 W., containing three (3) acres and 4 hundredths of an acre, the entire amount hereby conveyed being seventy (70) acres and 54 hundredths of an acre, and are situated in the county of Des
34 Moines, in the State of Iowa, as aforesaid, be sold at public sale, at the door of the United States court-house, at the city of Des Moines, in the State of Iowa aforesaid, upon due notice as required by the laws of the State of Iowa in respect to sales on execution, and that the proceeds of said sale or so much as shall be necessary for that purpose be applied by the master hereinafter named as follows, viz:

1st. To the costs of said sale.

2nd. To the costs of this suit and solicitors' fees allowed.

3rd. To the payment of debt and interest due to complainant as herein adjudged.

4th. The residue, if any, to be paid into the depository of this court to abide the further orders of the court.

It is further ordered, adjudged, and decreed that E. R. Mason, Esq., one of the masters of this court, be, and he is hereby, appointed to execute this decree, and the said master, on making sale of the said premises as herein ordered and decreed, do make and execute — the purchaser or purchasers of the said lands a certificate containing a description of the property and the amount of money paid by the purchaser, and stating that unless redemption is made in one year thereafter, according to the provisions of the statutes of the State of Iowa governing redemption from sales under execution, he or his heirs or assigns will be entitled to a deed for the same.

It is further ordered, adjudged, and decreed that if the said property shall not be redeemed from said sale within one year from and after the date thereof, then and in that case the said master
35 shall execute to the purchaser or his heirs or assigns a deed conveying all the rights, title, interest, estate, and property of said respondents, George H. Ellery and Cornelia Ellery, his wife, and each of them, in and to the said lands and every part or parcel thereof, as well as the interest of all persons claiming by, through, or under them or any of them since the date of the mortgage. It is further ordered, adjudged, and decreed that if said property be not redeemed from sale within one year from the date thereof, as aforesaid, the said respondents, George H. Ellery and Cornelia Ellery, his wife, and each of them, shall be forever debarred and foreclosed from sitting up any right, title, or interest, at law or in equity, in or to the said above-described lands or any part thereof, and that upon the delivery of the deed to be executed to the purchaser or purchasers as aforesaid, pursuant to this decree, they and each of them and all persons claiming under them or any of them since the said filing of said bill of complaint herein do immediately surrender and deliver up to the purchaser or purchasers aforesaid the possession of said lands and every part thereof.

It is further ordered that the said master shall, as soon as the said sale is made, report the same to this court for its action thereon, and that this cause do stand continued until the execution of this decree and the further order of this court.

(Signed) J. M. LOVE.

36 In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of the said court for said district, do hereby certify that the foregoing transcript contains a full, true, and complete copy of the decree in a certain cause adjudicated in said court, wherein Henry H. Scott was complainant and George H. Ellery *et al.* were defendants, as full, true, and complete as the original of the same now remains on file and of record in my office.

In testimony whereof I hereunto subscribe my name and
[SEAL.] affix the seal of said court, at my office, in Des Moines, in said district, this sixth day of June, A. D. 1885.

E. R. MASON,
Clerk U. S. C. C., Southern District of Iowa.

Clerk's Office U. S. Circuit Court, Des Moines, Iowa.

HENRY H. SCOTT
vs.
GEORGE H. ELLERY, CORNELIA ELLERY. } No. 1010. Eq.

Decree rendered June 10, 1878, for	$19,480 55
Interest to August 7, 1878	313 85
Attorney	500 00
Interest to August 7, 1878	4 83
Costs	137 19
Total due August 7, 1878	$20,436 42
37 August 7, 1878, credit by sale of real estate described in mortgage	$10,000 00
Balance due August 7, 1878	$10,436 42

Attest:
[L. S.] E. R. MASON,
Clerk U. S. Circ't Court, Dist. of Iowa.

Exhibit A.

Deposition for Proof of Debt Without Security by Creditor.

In the District Court of the United States for the District of New Jersey.

In the Matter of GEORGE H. ELLERY, Bankrupt. In Bankruptcy.

SOUTHERN DIVISION, *District of Iowa*, } *ss:*

At Burlington, in the county of Des Moines and State of Iowa, on the eighteenth day of January, A. D. 1879, before me, Sam'l K. Tracy, a notary public for Des Moines county, Iowa, came Henry H. Scott, of Burlington, in the county of Des Moines and State of Iowa, and made oath, and who, after being duly sworn and examined at the time and place aforesaid, upon his oath says that the said George H. Ellery, the person for whom the petition for adjudication in bankruptcy has been filed, at and before the filing of the said petition — and still is justly and truly indebted to this deponent in the sum of ten thousand four hundred and thirty-six dollars and forty-two cents.

38 The original consideration of said debt was the sale of certain real estate in the city of Burlington, Des Moines Co., Iowa, by deponent, Henry H. Scott, to said George H. Ellery at his instance and request, the said sum being the balance due upon a

certain judgment in the U. S. circuit court in favor of deponent against said bankrupt.

Said debt became due on the tenth day of June, A. D. 1878, and is evidenced and set forth in the certificate of the judgment of the U. S. circuit court for Iowa, hereto attached and marked Exhibit "A," and deponent says that judgment has been rendered thereon; that said judgment was rendered upon a note and mortgage executed by said bankrupt. Said Cornelia Ellery, being his wife, was made a party thereto to cut off her right of dower in said real estate, but no personal judgment was rendered against her; for which said sum of ten thousand four hundred and thirty-six dollars and fifty-two cents or any part thereof this deponent says that he has not nor has any person by his order or, to this deponent's knowledge or belief, for his use had or received any manner of satisfaction or security whatever.

And this deponent further says that the said claim was not procured for the purpose of influencing the proceedings under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of this deponet to sell, transfer, or dispose of said claim or any part thereof against said
39 bankrupt or to take or receive, directly or indirectly, any money, property, or consideration whatever whereby the vote of this deponent for assignee or any action on the part of this deponent or any other person in the proceedings under said act has been, is, or shall be in any way affected, influenced, or controlled.

(Signed) HENRY H. SCOTT,
Deposing Creditor.

Subscribed and sworn to this eighteenth day of January, A. D. 1879, before me, the undersigned, Sam'l K. Tracy.

(Signed) SAM'L K. TRACY,
[L. S.] *Notary Public.*

Endorsed: Filed Feb. 23, 1879. W. S. Belville, clerk.

UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I, Linly Rowe, clerk of the district court of the United States for the district of New Jersey, do hereby certify that the annexed is a true copy of the proof of debt filed by Henry H. Scott *In re* George H. Ellery, bankrupt, as the same remains of record and on file in my office.

In testimony whereof I have hereto subscribed my name and affixed the seal of said court, at Trenton, in said district, this fifth day of March, A. D. eighteen hundred and eighty-three.

[SEAL.] (Signed) LINSLY ROWE, *Clerk.*

40 UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I, John T. Nixon, judge of the district court of the United States for the district of New Jersey, do hereby certify that Linsly Rowe, whose name is attached to the foregoing certificate, was at the time of making the same and still is clerk of the aforesaid court, and full faith and credit are due all his acts as such, and that the seal affixed to said certificate is the seal of said court, and the attestation thereto is in due form.

In testimony whereof I have hereto subscribed my name, at Trenton, in said district, this fifth day of March, A. D. eighteen hundred and eighty-three.

(Signed) JOHN T. NIXON,
District Judge.

District Court of the United States, District of New Jersey.

Whereas George H. Ellery, of the county of Union, in said district, has been by the said court duly adjudged a bankrupt under the Revised Statutes of the United States, title LXI, "Bankruptcy," and the acts supplementary thereto, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said George H. Ellery be, and he hereby is, discharged from all debts and claims which by said title are
41 made provable against his estate and which existed on the thirty-first day of August, in the year of our Lord eighteen hundred and seventy-eight, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said title excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at Trenton, in said district, this twenty-fifth day of February, in the year of our Lord eighteen hundred and seventy-nine.

[L. S.] (Signed) JNO. T. NIXON,
Judge of the U. S. District Court, District of New Jersey.

UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I, Linsly Rowe, clerk of the district court of the United States for the district of New Jersey, do hereby certify that the annexed is a true copy of the order of final discharge in bankruptcy *In re* George H. Ellery, bankrupt, as the same remains of record and on file in my office.

In testimony whereof I have hereto subscribed my name and affixed the seal of said court, at Trenton, in said district, this fifth day of March, A. D. eighteen hundred and eighty-three.

[SEAL.] (Signed) LINSLY ROWE, *Clerk.*

Exhibit "B."

42 EXHIBIT C.

United States Circuit Court, Central Division, Southern District of Iowa, May Term, 1879.

THURSDAY, *May 15th*, 1879.

HENRY H. SCOTT
vs.
GEORGE H. ELLERY. } No. 1010. Equity.

This cause came on this day for hearing on the motion of P. Henry Smythe, complainant's solicitor, for a judgment and execution for *a judgment and execution for* balance due on decree herein.

And, it appearing that after applying the proceeds realized from the sale of the mortgaged premises to the payment of the decree, interest, and costs and the costs of said sale that there remains due on said decree the sum of ten thousand four hundred and thirty-six and $\frac{42}{100}$ dollars—

It is ordered, adjudged, and decreed that plaintiff have and recover of and from defendant, George H. Ellery, said sum of ten thousand four hundred and thirty-six and $\frac{42}{100}$ dollars, with interest, at the rate of ten per cent. per annum, from August 7, 1878, and that execution issue therefor.

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of the said court for said district, do hereby certify that the foregoing transcript contains a *a* full, true,
43 and complete copy of the decree for balance due after sale of mortgaged premises in a certain cause adjudicated in said court, wherein Henry H. Scott was complainant and George H. Ellery was defendant, as full, true, and complete as the original of the same now remains on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in Des Moines, in said district, this 12th day of January, A. D. 1886.

(Signed) E. R. MASON,
[SEAL.] *Clerk U. S. C. C., Southern District of Iowa.*

Deposition of Plaintiff.

In the Circuit Court of the United States for the Southern District of Iowa, Eastern Division.

GEORGE H. ELLERY, Plaintiff,
against
H. H. SCOTT, Defendant.

STATE OF NEW YORK,
Southern District of New York, County of New York, } *ss:*

I hereby certify that on the 24th day of December, 1885, before

me, Vincent Rosemon, a notary public in and for the county of New York and State of New York, at the office of Ten Eycke & Remington, No. 271 Broadway, in the city of New York, county of New York, and State of New York, personally appeared before
44 me, pursuant to the notice hereto annexed, George H. Ellery, the witness named in said notice, and Sandford R. Ten Eycke, Esquire, appeared as counsel for plaintiff, and no one appeared for defendant, and the said George H. Ellery, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the deposition hereto annexed.

And I further certify that the said deposition was then and there reduced to writing by me, and was, after it had been reduced to writing, subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court, as required by law.

And I further certify that the reason why the said deposition was taken was that the said witness resides at New York city, more than one hundred miles from Keokuk, Iowa, the place where this cause is to be tried.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

And I further certify that the fee for taking said deposition, $5.00, has been paid to me by the defendant, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal, at the city of New York, in the county and State of New York, this 24th day of December, A. D. 1885.

(Signed) VINCENT ROSEMON,
[SEAL.] *Notary Public, Kings and New York Counties.*

45 UNITED STATES OF AMERICA,
Southern District of Iowa,
Eastern Division, Lee County, } *ss:*

GEORGE H. ELLERY, Plaintiff,
against
H. H. SCOTT, Defendant. } In Circuit Court at Keokuk.
Notice.

To defendant or John C. Powers & H. Scott Howell & Son, his attorneys:

You are hereby notified that plaintiff, Geo. H. Ellery, will, on the 24 day of December, 1885, at the office of Ten Eycke & Remington, No. 271 Broadway, in the city of New York, county of New York and State of New York, proceed to take the deposition of George H. Ellery, under act of Congress, to be read as evidence in the trial of the above-entitled cause.

The taking of said deposition will be commenced at 11 o'clock a.

m. of said day and will be continued from day to day until completed.

(Signed) HALL & HUSTON,
HAGERMAN, McCRARY & HAGERMAN,
Solicitors for Complainant.

We hereby accept service of the within notice and acknowledge receipt of a copy of same on this 15th day of December, A. D. 1885.

(Signed) H. SCOTT HOWELL & SON,
Att'ys for Defendant.

46 In the Circuit Court of the United States for the Southern District of Iowa, Eastern Division.

GEORGE H. ELLERY, Plaintiff,
against
H. H. SCOTT, Defendant.

STATE OF NEW YORK,
Southern District of New York,
City and County of New York, } *ss:*

GEORGE H. ELLERY, a witness called on behalf of the plaintiff herein, and residing at the city of New York, more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

Question. What is your name and where do you reside?

Answer. My name is George H. Ellery; I reside at 228 West 38th St., New York; have resided there since May 1st last. Prior to that time I resided at Elizabeth, New Jersey, for ten years prior to that date. I am the plaintiff in this action. I know the defendant, H. H. Scott, and have known him for fifteen years.

In 1874 or 1875 I purchased from the defendant Scott 72 acres of land, which is now in the city of Burlington, Iowa. I paid him part cash and gave him a mortgage on the property to secure the balance. Some time in 1880 Scott began an action to foreclose that mortgage. I appeared in that action and employed Hall &

47 Baldwin as my attorneys. I put in no answer, having no defense to the action, but appeared therein solely for the purpose of gaining as much delay as possible. I did not know at that time that Scott could proceed against me in that action and obtain a personal judgment against me for a deficiency. I had no knowledge of the laws of the State of Iowa at that time upon that subject, and I never knew that he had done so until about six months before I began this action against Scott. As soon as I discovered that he had obtained judgment against me I employed Hall & Huston, of Burlington, Iowa, to look after my rights and interests and they instituted this suit. I received my discharge in bankruptcy under the laws of the United States.

At the time Scott's suit was pending against me I was living in

Elizabeth, New Jersey, and did not know that it was necessary for me to plead my discharge in bankruptcy or the pendency of bankruptcy proceedings as a defense to that action. During all the time that Scott's suit was pending against me I was absent from the State of Iowa. I never received any notice or had any knowledge that Scott had recovered a personal judgment against me until the time before mentioned. I am not certain as to the dates when Scott began his suit against me and recovered his judgment against me, nor of the exact date when I first learned of the said judgment, except that it was a short time before this suit was brought, for the reason that all my papers bearing on the subject are in Iowa.

My object in employing Hall & Baldwin to appear for me
48 in the foreclosure proceedings was, as I have stated, merely that they might obtain for me such delay as they could, after which their engagement ceased.

(Signed) GEO. H. ELLERY.

Subscribed and sworn to before me this 24th day of December, A. D. 1885.

(Signed) VINCENT ROSEMAN,
[SEAL.] *Notary Public, Kings & New York Counties.*

United States Circuit Court, District of Iowa, October Term.

MONDAY, *November 4th*, 1878.

HENRY H. SCOTT
vs.
CORNELIA ELLERY *et al.* } No. 1010. Eq.

This cause came on this day, and on motion of P. Henry Smythe, solicitor for complainant, it was ordered, adjudged, and decreed that the sale of the premises in the decree herein, made by E. R. Mason, one of the masters in chancery of this court, on the seventh day of August, 1878, be, and the same is hereby, in all respects ratified and confirmed.

United States Circuit Court, Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains a full, true, and complete copy of the order confirming the master's report of sale in a
49 certain case adjudicated in said court wherein one Henry H. Scott was complainant and Cornelia Ellery *et al.* were defendants, as full, true, and complete as the original of the same now remains of record in my office. I further certify that the above order is the only one entered in said cause after the decree of foreclosure, except decree for general execution, which was entered on the 15th day of May, 1879.

In testimony whereof I hereunto subscribe my name and affix

the seal of said court, at my office at Des Moines, in said district, this 25th day of June, 1886.

(Signed) E. R. MASON,
[SEAL.] *Clerk U. S. Circuit Court, Southern Dist. of Iowa.*

Endorsed: Filed March 19, 1887. H. K. Love, clerk.

And afterwards, to wit, on the 25th day of June, A. D. 1887, a decree was filed and entered of record in the circuit court of the United — in and for the southern district of Iowa, eastern division, at Keokuk, and which reads in words and figures as follows, to wit:

In the Circuit Court of the United States for the Southern District of Iowa, Eastern Division, at Keokuk.

GEORGE H. ELLERY, Complainant,
vs.
H. H. SCOTT, Defendant.

Decree.

This cause coming on for hearing upon the pleadings and
50 proofs upon file, the complainant appeared by Anderson, Davis & Hagerman and Hall & Huston, his solicitors, and defendant, by J. C. Power and H. Scott Howell & Son, his solicitors, and the court, being fully advised in the premises, doth find for the complainant.

It is therefore ordered, adjudged, and decreed that the decree of the United States circuit court, central division, district of Iowa, at the May term, 1879, entered on May 15th, 1879, in case No. 1010, equity, in the case of H. H. Scott against George H. Ellery, be, and same is hereby, vacated and cancelled, and defendant is forever enjoined from enforcing same. It is further ordered that the clerk of this court for the central division, at Des Moines, shal- enter a copy of this decree upon the records at such place. It is further ordered that within thirty days the defendant, H. H. Scott, pay the plaintiff the costs of this suit, taxed at $—, and that same be enforced according to rules in such cases made and provided. Defendant excepts to the foregoing decree and now, in open court, prays for appeal to the Supreme Court, and same is hereby granted. The appeal bond is fixed at $300.00.

(Signed) J. M. LOVE, *Judge.*

Endorsed: Filed June 25th, 1887. H. K. Love, clerk.

And afterwards, to wit, on the 28th day of May, 1888, the defendant files his petition for appeal, which reads in words and figures as follows, to wit:

51 In the Circuit Court of the United States in and for the Eighth Circuit and Eastern Division of the Southern District of Iowa.

GEO. H. ELLERY, Complainant,
vs.
H. H. SCOTT, Defendant. } In Equity.

Petition of the Defendant for Appeal.

The above-named defendant, H. H. Scott, conceiving himself aggrieved by the final decree rendered in the above-entitled cause on the twenty-fifth (25th) day of June, 1887, does hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court.

(Signed) J. C. POWER AND
H. SCOTT HOWELL & SON,
Solicitors for Def't.

Dated this 28th day of May, 1888.

Endorsed: Filed May 28th, 1888. H. K. Love, clerk.

And on the 30th day of June, 1888, the order allowing appeal was made and entered of record, and reads in words and figures as follows, to wit:

In the United States Circuit Court in and for the Eighth Circuit of the Eastern Division of the Southern District of Iowa.

52 GEORGE H. ELLERY, Complainant,
vs.
H. H. SCOTT, Defendant. } In Equity. No. —.

This day, to wit, the 30th day of June, 1888, came the defendant in the above-entitled cause, by J. C. Power and H. Scott Howell & Son, his solicitors, and, on his motion, an appeal to the Supreme Court of the United States is allowed upon his entering into bond to the complainant in the penalty of $500.00, and conditioned as the law directs.

(Signed) J. M. LOVE, *Judge.*

Dated this 30th day of June, 1888.

Endorsed: Filed June 30, 1888. H. K. Love, clerk.

And afterwards, to wit, on the 25th day of July, 1888, the appeal bond for costs was filed, and which reads in words and figures as follows, to wit:

Know all men by these presents that we, H. H. Scott, as principal, and J. S. Schramm and William A. Torney, as sureties, are hereby firmly held and bound, jointly and severally, unto Geo. H.

Ellery and his administrators and executors in the penal sum of five hundred dollars ($500.00).

Dated and signed by us this ninth day of July, A. D. 1888, as witness our hands and seals.

But the condition of this bond is such that whereas, on the 25th day of June, A. D. 1887, at the June term, 1887, of the United
53 States circuit court for the southern district of Iowa, eastern division, in the action therein then pending, wherein Geo. H. Ellery was complainant and H. H. Scott was defendant, a final decree was therein had and entered in favor of said complainant and against said defendant;

That thereafter, on the 28th day of May, A. D. 1888, defendant filed his petition in said circuit court praying an appeal from said decree to the Supreme Court of the United States, and, the complainant having been served with notice of the said petition, at the June term, 1888, of said circuit court, on the 30th day of June, 1888, said petition was considered by the court and an appeal from said decree was granted and allowed to the Supreme Court of the United States, and the appeal bond fixed at five hundred dollars ($500.00):

Now, therefore, if the said H. H. Scott shall duly prosecute his said appeal to the Supreme Court of the United States to effect and, failing to make his said appeal good, shall answer and pay all costs, then this bond shall be void; otherwise, same shall be and remain valid and good.

(Signed) HENRY H. SCOTT. [L. S.]
J. S. SCHRAMM. [L. S.]
WM. A. TORNEY. [L. S.]

The foregoing bond is approved.
July 25th, 1888.
(Signed) J. M. LOVE, *Judge.*

Endorsed: Filed July 25, 1888. H. K. Love, clerk.

And on August 6th, 1888, the citation was filed, which reads in words and figures as follows, to wit:

54 In the United States Circuit Court in and for the Eighth Circuit, Southern District of Iowa, Eastern Division.

GEORGE H. ELLERY, Complainant,
against
H. H. SCOTT, Defendant.

UNITED STATES OF AMERICA, *ss:*

To the above-named complainant, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1888, pursuant to an appeal allowed to and taken by H. H. Scott from the decree rendered in the above-entitled cause in the said circuit court of the United States, southern district of Iowa, eastern division, on the 25th day of June, 1887, a

bond having been given as provided by law and said appeal
55 having been granted and allowed on the 30th day of June, A. D. 1888, to show cause, if any there be, why the said decree should not be reversed and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Love, district judge of the district court of the United States for the southern district of Iowa, this 31st day of July, A. D. 1888.

J. M. LOVE, *Judge.*

Due and legal service of the above citation is hereby acknowledged the 4th day of August, 1888.

HALL & HUSTON,
Attorneys for Complainant.

56 [Endorsed:] U. S. circuit court. Geo. H. Ellery, compl't, *vs.* H. H. Scott, def't. Citation of appeal. Filed Aug. 6, 1888. H. K. Love, clerk. J. C. Powers & H. Scott Howell & Son, def't's solicitors.

57 UNITED STATES OF AMERICA, } *ss:*
Southern District of Iowa, Eastern Division, }

I, Henry K. Love, clerk of the circuit court of the United States for said southern district and eastern division of Iowa, in pursuance of the order allowing an appeal in said cause, do hereby certify that the foregoing is a true and correct copy, full and complete, of the records and proceedings, pleadings, evidence, and orders and the final decree in said cause on file and of record in my office, including the order allowing the appeal and the bond on appeal, with the approval thereof, and the original citation.

In witness whereof I have hereunto set my hand and caused the seal of the said circuit court of the United States for the southern district of Iowa, eastern division, to be affixed, at Keokuk, in said district, this 21st day of August, A. D. 1888.

[Seal of the Circuit Court of the U. S., Southern Dist. of Iowa.]

H. K. LOVE,
Clerk Circuit Court United States, Southern Dist. Ia., Ea. D'v.,
By ERIE J. LEECH, *Deputy.*

[Endorsed:] Geo. H. Ellery, appellee, *vs.* H. H. Scott, appellant. Transcript of record & citation. John C. Power & H. Scott Howell & Son, attorneys for appellant.

Endorsed on cover: S. Iowa C. C. U. S. No. 117. Eveline Scott, executrix of H. H. Scott, deceased, appellant, *vs.* George H. Ellery. Filed September 24, 1888.

Office Supreme Court U. S.
FILED,
NOV 12 1891
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

October Term, 1891.

EVELINE SCOTT, Executrix of H. H. SCOTT, Deceased, Appellant,

vs.

GEORGE H. ELLERY, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

H. SCOTT HOWELL and WILLIAM C. HOWELL, Solicitors for Appellant.

E. S. HUSTON, Solicitor for the Appellee.

MEMORANDUM OF ARGUMENT AND BRIEF OF COUNSEL FOR THE APPELLANT.

WM. REES & CO., PRINTERS, KEOKUK.

IN THE

Supreme Court of the United States.

October Term, 1891.

EVELINE SCOTT, Executrix of H H. SCOTT, Deceased, Appellant,

vs.

GEORGE H. ELLERY, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

H. SCOTT HOWELL and WILLIAM C. HOWELL, Solicitors for Appellant.

E. S. HUSTON, Solicitor for the Appellee.

MEMORANDUM OF ARGREEMENT AND BRIEF OF COUNSEL FOR THE APPELLANT.

PARTIES TO THE SUIT:—

The complainant and appellee in this suit was George H. Ellery, a citizen and resident of the state of New Jersey.

The said George H. Ellery, having died after this suit was pending on appeal in this court, Cornelia Ellery, as administratrix, of the estate of George H. Ellery, deceased, is substituted as appellee.

The defendant, and appellant in this suit was H. H. Scott, a citizen and resident of the State of Iowa. The said H. H. Scott having died after this suit was pending on appeal in this court. Eveline Scott, executrix of H. H. Scott, deceased, was substituted as appellant.

HISTORY.

The original bill was filed on the 10th day of December, 1883. On the 18th day of Februry, 1884, the defendant H. H. Scott filed an answer. Afterwards, on the 6th day of July, 1885, the said defendant filed an amended answer to the bill of complaint, and thereupon on the 3d day of August, 1885, the complainant filed a general replication. The entire evidence in the case consisted in an agreed statement of facts, and the deposition of Geo. H. Ellery. The case was finally brought on for hearing and on the 25th day of June, 1887, a decree was filed and entered in the Circuit Court in favor of the complainant, George H. Ellery. On the 30th day of June, 1888, an appeal was allowed to this court.

STATEMENT OF CASE.

On or about the 17th day of August, 1877, H. H. Scott, the appellant in this case commenced a suit in the District Court of Des Moines County, State of Iowa, to foreclose a mortgage on a large amount of

land situated in Des Moines County, Iowa, made by George H. Ellery and Cornelia Ellery, his wife, to secure the payment of a note signed by the said George H. Ellery in favor of the said H. H. Scott.

Due and legal service of notice was had upon the said George H. Ellery, and the said Ellery appeared in said District Court of Des Moines County, Iowa, and by his attorney, asked for, and obtained a removal of said cause into the Circuit Court of the United States, for what was then known as the Central Division of the District of Iowa, sitting at Des Moines, Iowa.

In this suit the said George H. Ellery was represented by Hall and Baldwin, attorneys.

This suit for foreclosure was thereupon prosecuted in the United States Circuit Court, and such proceedings were therein afterwards had, that on the 10th day of June, 1878, a decree was duly had and entered in said United States Court, finding and adjudging the sum of $19,480.50, and costs of suit taxed at $———, to be due from the said George H. Ellery to the said H. H. Scott, and ordering the said George Ellery to pay said sum by the 20th day of June, 1878, and in default of payment the mortgaged premises were ordered to be sold by the Master in Chancery, to satisfy the costs and the debt and interest due to the said H. H. Scott, as adjudged in the decree.

The decree, after appointing E. R. Mason, Master in Chancery, to make the sale, concludes with the order, which is in the following words:

"It is further ordered that the said master shall, as soon as the said sale is made, report the same to this court for its action thereon, and that this cause do stand continued until the execution of this decree and the further orders of this court."

On the 7th day of August, 1878, the mortgaged property was sold to satisfy the amount adjudged due from the said Ellery, and at said sale, made by the master in chancery, there was realized the sum of $10,000.00, and on the 4th day of November, 1878, at the October term of said court, the sale was confirmed by the court.

The following is a statement of the indebtedness due from Ellery to Scott, as determined in the decree, and calculated with interest up to the date of sale of the mortgaged property and as reported by the said master in chancery to the court.

CLERK'S OFFICE, UNITED STATES CIRCUIT COURT, Des Moines.

HENRY H. SCOTT, vs. GEORGE H. ELLERY, ET AL. } No. 1010. Eq.

Decree rendered, June 10th, 1878, for...	$19,480.55
Interest to August 7th, 1878.....	313.85
Attorney fee.....	500.00
Interest to August 7th, 1878.....	4.83
Costs	137.19
Total due August 7th, 1878..	$20,436.42
August 7th, 1878, credit by sale of real estate described in mortgage.....	$10,000.00
Balance due, Aug. 7th, 1878.....	$10,436.42

On the 31st day of August, 1878, a petition of involuntary bankruptcy was filed against said Ellery by some of his creditors, not including the said Scott, in the United States District Court, for the district of New Jersey. On the 1st day of October, 1878, the said George H. Ellery was duly adjudged a bankrupt, and on the 23d day of October, 1878, his estate was duly conveyed by the Register in Bankruptcy to the assignee in the usual manner.

On the 27th day of January, 1879, the said H. H. Scott filed with the Register in Bankruptcy, in said United States District Court for the District of New Jersey, his proof of debt against the estate of said Ellery, bankrupt, based upon the decree of foreclosure above referred to, after allowing the credit of $10,000 realized by the sale of the mortgaged premises. The balance of said claim so proved being $10,436.42.

On the 25th day of February, 1879, the said George H. Ellery was granted a certificate of discharge in bankruptcy by the United States District Court for the District of New Jersey. No dividend was ever allowed or paid by the assignee of Ellery's estate on any claim filed against said estate.

On the 15th day of May, 1879, at the May term 1879, of the United States Circuit Court for the District of Iowa, at Des Moines, which was the next regular term of said court, held after the confirmation of the sale of the mortgaged premises, the said H. H. Scott appeared by his attorney, and as provided in equity Rule No 92, prayed the court to

make order and enter a decree for the balance that was shown to be due the said H. H. Scott, from the said George H. Ellery, over and above the proceeds of the sale of the mortgaged property, to-wit, to make and enter a deficiency decree for the sum of $10,-436.42. The matter having been considered by the court the following decree was made and entered. "It is ordered adjudged and decreed that plaintiff have and recover of and from defendant George H. Ellery said sum of $10,436.42, with interest at the rate of ten per cent per annum from August 7th, 1878, and that execution issue therefor."

It is to set aside and cancel, and enjoin the execution of this decree, that the said George H. Ellery commenced this suit.

Ellery in his Bill of Complaint, objects to this decree, and asks the above relief upon two grounds:

1st. That H. H. Scott, having filed his claim with the Register in Bankruptcy against the estate of Ellery that this was a ground of equitable relief, against this deficiency decree, which the said Scott obtained, although the said deficiency decree was made and entered by the court after Ellery had been discharged in bankruptcy.

2d. Because no new notice was given to Ellery, at the time, the deficiency decree was made and entered by the court, that such a decree would be asked for, and because Ellery had no knowledge that such motion was made, and had no opportunity to oppose the same, therefore the decree rendered by the court was obtained wrongfully and fraudulently, and

was entered inadvertantly by mistake, and was in violation of the bankrupt act, and should therefore be set aside.

The complainants' bill no where alleges that at the time the deficiency decree was entered the court did not have jurisdiction to render the same.

The proving of the claim against Ellery's estate, and fact that Ellery had no notice of the motion for the deficiency decree, are the only grounds stated for the relief asked in complainants' bill.

On the 25th day of June, 1887, the following decree was rendered in the United States Circuit Court for the Southern District of Iowa, in this suit. "It is therefore ordered adjudged and decreed that the decree of the United States Circuit Court Central Division, District of Iowa, at the May term, 1879, entered on the 15th day of May, 1879, in case No. 1010 Equity, in the case of H. H. Scott against George H. Ellery be and same is hereby vacated and cancelled, and defendant is forever enjoined from enforcing same."

ASSIGNMENT OF ERRORS.

No opinion was filled in the court below, in rendering the decree in favor of the complainant, nor were any rulings made upon the admission or rejection of testimony. In the rendition of the decree, in the complainant's favor, error intervened to the prejudice of H. H. Scott, the appellant, as will appear from the record.

The court erred, in finding in favor of the complainant, and in rendering a decree that the decree of the United States Circuit court, Central Division, District of Iowa, at the May term 1879, entered on the 15th day of May 1879, in Case No. 1010, Equity, in case of H. H. Scott vs. George H. Ellery, be vacated and cancelled and that the defendant, H. H. Scott, be forever enjoined from enforcing the same.

The facts in this case being undisputed, the court erred in not dismissing the complainant's bill.

Under the pleading and the evidence in the case, all of which was undisputed, the court erred in granting the complainant any relief, and especially in vacating and cancelling the decree in the case of H. H. Scott vs. George H. Ellery, No. 1010, Equity, made on the 15th day of May, 1879, by the United States Circuit Court, Central Division, District of Iowa, and enjoining the defendant, H. H. Scott from enforcing said decree, whereas the court should have dismissed the Bill of Complaint of George H. Ellery, and permitted the decree of the date of May 15th, 1879, above referred to, to stand, and should have refused to enjoin the defendant from enforcing the same.

BRIEF AND ARGUMENT.

Two questions are presented for the determination of this court.

FIRST—Is Ellery's discharge in bankruptcy a sufficient ground to set aside the deficiency decree, which was rendered nearly three months after the discharge had been granted?

SECOND—Because no notice was served on Ellery that a motion would be made for the deficiency decree, is this a reason to set aside and annull this deficiency decree, in an equitable proceeding commenced nearly six year's thereafter?

We desire to discuss these questions in the order above stated.

EFFECT OF ELLERY'S DISCHARGE IN BANKRUPTCY.

Because the deficiency decree was rendered after Ellery obtained his discharge in bankruptcy, we contend that this prior discharge is not an equitable ground for the annulling of this decree and enjoining its execution.

The foreclosure suit of H. H. Scott against George H. Ellery was commenced on the 17th day of August 1877. The decree *nisi*, in which the mortgaged property was ordered to be sold, was rendered on the 10th day of June 1878. The property was sold on the 7th day of August 1878, and the sale confirmed on the 4th day of November 1878, and the 15th day of May 1879 the deficiency decree was renderred by the court.

Now between the time the decree *nisi* for the sale of the property was made, and the time the deficiency decree was rendered, Ellery was put into involuntary bankruptcy, his estate was transferred to an assignee and he was finally discharged as a bankrupt on the 25th day of February, 1879, nearly three months before any motion was made for the deficiency decree.

The simple question is, has Ellery waived his discharge in bankruptcy, as a defense, to the deficiency decree, by his failure to plead the same in the proper court, before the deficiency decree was rendered.

Bankrupt proceedings in themselves have no effect upon the action or jurisdiction of any other court. It is only the certificate of discharge which the bankrupt might finally receive, which would avail him, as against all debts, which were actually proved or which by law were made provable against his estate, when properly pleaded, against such a claim, before it is reduced to a judgment. In other words, the certificate of discharge in bankruptcy, is a general receipt which the bankrupt holds against all claims, which were provable against his estate, but which like any other receipt, when such a claim is pending against him in court, he must properly plead, as a defense, or, if he fails to plead it as a defense before the claim is reduced to a judgment by the court, he is deemed to have waived it, and is forever estopped from setting it up again as a defense against the judgment.

The operation of bankruptcy proceedings upon other courts having jurisdiction of an action are fully discussed in two well considered cases in the United States Supreme Court. The case of Eyster vs. Graff, 91 U. S.; 521-524, is the leading case and settled the law, as to the effect of bankruptcy proceeding upon the jurisdiction of the court. Without reciting the facts, we quote the principles laid down by Justice Miller.

It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State Court or other courts the instant one of the parties is adjudicated a bankrupt. There is nothing in the act which sanctions such a proposition."

"The court in this case before us had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer full justice and was proceeding according to the law which governs such suits, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however *seriously they might have affected the rights of the parties to the suit already pending.*"

"It was the duty of that court to proceed to a decree as between parties before it, until by some proper pleading in the case it was informed of the changed relations of any of those parties to the subject matter of the suit."

The case of Revere Copper Co. vs. Dimock, 90 N. Y. 33, presents a decision which is almost perfectly in point. In January, 1874, plaintiff commenced an action on two promissory notes, defendant appeared and answered and the case was continued from term to term to the January term, 1875, when the case on being called defendant suffered default. In June, 1874, defendant was adjudicated an involuntary bankrupt and on 26th of March 1875, received his discharge.

On the first of April, 1875, plaintiff had his judgment entered up on his default rendered in January, without notice to defendant. The court says: "We are of the opinion that the trial judge was right. The proceedings in bankruptcy did not oust the jurisdiction of the Mass. Court of jurisdiction of the action. The action could have been stayed upon the application of the bankrupt court, but unless so stayed it could proceed to a valid judgment." The court goes on and lays down the law broadly that if the defendant did not plead his discharge, although the default was entered prior to the discharge, he is estopped to assert it now. "It is the estoppel furnished by the judgment recovered subsequent to the discharge, which stands in the defendant's pathway, that closes his mouth to allege the discharge." The court says that the defendant should have applied to the court to open the default or an action in equity to enjoin the judgment but it says: In such action however he would be obliged to prove fraud, imposition, mistake or some other ground for equitable interferance. It would not have been sufficient for him to show that the dect for which the judgment was entered had been discharged, *or that the judgment was unjust.*

This case was appealed to the Supreme Court of the United States, and the decision is found in the 117 U. S., page 559. The decision of the New York Court of Appeals is affirmed and the law is clearly laid down that a discharge in bankruptcy is no bar to an action on a judgment recovered against the bankrupt after his discharge in a suit, commenced

before the bankruptcy, and pending when the discharge was granted and founded upon a debt provable against him in bankruptcy.

There are many cases holding that if the defendant does not plead his discharge, he is deemed to have waived it, and that a judgment obtained afterwards estops him from setting up his discharge, except by a motion to open the proceeding, made in the court which rendered the judgment.

Hill vs. Harding, 107 U. S., 631. On page 633, the court says: "If neither the bankrupt nor his assigned in bankruptcy applied for a stay of proceedings, the court may of course proceed to judgment."

Doe vs. Childers, 21 Wall, 642.

Eyster vs. Graff, 91 U. S., 521.

Norton vs. Switzer, 93 U. S., 355.

Bradford vs. Rice, 102 Mass., 472.

Wells vs. Edison, 22 N. W. R., 497.

Bellamy vs. Woolson, 4 Geo., 174.

Finny vs. Mayer, 61 Geo., 500.

Jones vs. Croker, (1876) 5 Miss., 198.

High on Injunctions, Sec. 111: "a judgment debtor will not be allowed to enjoin the judgment because of his discharge in bankruptcy, after incurring the obligation on which the action was brought when he neglected to avail himself of his discharge or plead it in defense of the action." Id. Sec. 277. "In absence of fraud or deception, an injunction will

rarely be allowed against a judgment which complainant has suffered to go against him by default."

The only point in this case which is not fully covered in the decisions above cited, and which can possibly distinguish it from those cases, is that Scott filed his claim with the Register in bankruptcy.

Section 21 of the Bankrupt Act of 1867, same being Section 5105 of the Revised Statutes, provides "that no creditor proving his debt shall be allowed to maintain any suit at law or in equity therefor, against the bankrupt, but shall be deemed to have waived all right of action, and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby." And further "No creditor whose debt is probable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined."

The discharge which the bankrupt finally receives is the defense which he has against, either claims proved against his estate, or claims which were probable.

A creditor who has a suit pending against a bankrupt, when he files his same claim against the bankrupt estate, does not thereby divest the court, in which his suit is pending of jurisdiction, to proceed with the suit to final judgment. Whether the creditor makes proof of his claim against the bankrupt or

not, unless the bankrupt does something to bring to the knowledge of the court in which the suit for the claim is pending, that the bankruptcy proceedings are pending, it is the duty of that court to proceed in the regular way until final judgment.

Where a creditor makes proof of his claim against the bankrupt's estate, if there is a suit pending against the bankrupt in another court, Sec. 5105, R. S., gives the debtor the right to plead in that court, that the creditor has made proof of his claim in the Bankrupt Court, and thereupon the court, instead of permitting the creditor to go ahead and reduce his claim to a judgment, requires him to either abandon his suit until the question of the bankrupt's discharge is determined, or to dismiss his suit entirely.

If the creditor does not prove his claim, he may proceed to reduce it to a final judgment.

We have examined every case decided under Sec. 5105, and not one of them holds or even intimates that the proving of the creditor's claim *ipso facto*, operates to dismiss a pending suit on the same claim, unless that fact is properly pleaded in the case.

If Ellery had appeared in the United States Circuit court in Iowa and set up the fact, that Scott had filed his claim for the unsatisfied balance in the Bankrupt Court, the Circuit Court might not have rendered the deficiency decree.

In the case of Smith vs. Dispatch Co., 35 New

Jersey Law, page 60, the question of the effect of a creditor's proving his claim in the Bankrupt Court is fully discussed, and it was held that a creditor, by proving his claim, in a bankruptcy proceeding does not, thereby, by force of Sec. 5105 of Revised Statutes, destroy his right of action; the effect of such act being merely to suspend such right of action, during the pendency of the proceeding, when the bankrupt applies to the court, in which the action is pending, for such relief.

The failure of the debtor to prove his discharge in bankruptcy, is the same in cases where the creditor proves his claim as where he does not prove it. If the court has jurisdiction to render the decree, then the decree is binding on the parties, until set aside for fraud or mistake. The fact that the creditor has proved his claim in the bankrupt court is a defense which is personal to the debtor, and which he can make or not, as he likes, but if he wishes to avail himself of it, he must certainly plead it, the same as he is required to plead his discharge in bankruptcy.

If the debtor failed to make this defense, how can the court now say that he did not intend to waive it. Further, how can the court say that this claim, for which Scott obtained this deffciency decree against Ellery was not for a debt contracted in a fiduciary capacity, and therefor not barred by Ellery's discharge in bankruptcy, or how can the court say that after Ellery's discharge in bankruptcy he did not promise in writing to pay this claim.

It seems to us there is no distinction between the

cases in which the claim is proved against the bankrupt's estates, and those in which the creditor fails to prove his claim. Other courts take no judicial notice of the bankrupt proceedings, but as was held in Eyster vs. Graff, *Supra*, it is the *duty* of the court to proceed to a decree, between the parties before it, until by some proper pleading in the case, it is informed of the changed relations of any of those parties, to the subject matter of the suit.

We snbmit, therefore, that the deficiency decree ought not to have been set aside, because Scott filed his claim with the Register in bankruptcy, or because Ellery obtained a discharge in bankruptcy, when Ellery failed to plead either of these facts, in the proceedings in which the deficiency decree was rendered.

II.

DEFICIENCY DECREE WITHOUT NOTICE.

Should the deficiency decree be set aside because no newnotice was served upon Ellery, when the motion therefor was made.

Briefly we answer that it should not for the following reasons:

1st. When the decree *nisi* for forclosure was entered an order, was inserted in it, ordering the cause to stand continued for the execution of the decree, "*and the further orders of this court.*" This order contemplated the deficiency decree and kept the parties in Court. Hence no notice was necessary.

2d. In general, the deficiency decree is in execution of the original decree, and incident to it, and the parties are still in court, and if the motion is presented in term time no notice is necessary.

3d. The rule does not require notice; therefore notice is not necessary. When by the terms of the rule, notice is not required, in the language of the Supreme Court in Bank vs. White, 8 Pet., 269, "It cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review."

4th. Ellery was in default for want of answer his attorney had been discharged on removing the case to the Federal court, especially under such circumstances, he is not entitled to notice

5th. Granting that notice in such cases is *salutory*, and that it was error for the court to render this decree without notice; yet this is not an error that goes to the jurisdiction of the court over the parties so as to render its decree a void proceeding or a nullity.

A court cannot annul its own decree for errors or irregularities, but only where the decree was obtained by fraud or when there is a total want of jurisdiction over the parties. If it was error for the court to render this deficiency decree without notice, it must be corrected by motion promptly made to set it aside, and if this is refused then by bill of review or appeal.

After Ellery had succeeded in getting the foreclosure case removed into the United States Circuit Court, he discharged his attorneys, and in his depo-

sition (see Record, page 25) he testifies that his purpose in removing the case to the Uuited States Circuit Courts was to obtain as much delay as possible.

It will also be remembered that when the decree *nisi* for the forclosure was rendered, that this order was put in the decree "that this cause do stand continued for the execution of this decree and the further orders of the court." (See Record page 18.

Now the question which we submit to the court may be stated thus: whether or not Ellery having discharged his attorney upon the removal of his case to the Federal Court, and being in default when the foreclosure decree was rendered, and the court having made the order in the decree, "that this cause do stand continued until the execution of this decree, and the further orders of the court," does the fact that Ellery was given no notice of the motion which was made at the next term after the confirmation of sale, for the deficiency decree against him, make the decree a nullity, and a void proceeding, for a total want of jurisdiction over the parties.

This is a fair statement of the question involved in this case. It is not whether in foreclosure cases, notice of the motion for the deficiency decree is *"salutory"*. It is not whether in the original proceedings the court should refuse to render the deficiency decree before notice was given. It is not even if the court committed error in rendering this decree without notice, whether, if the case was before the Supreme Court on writ of error or appeal, it would re-

verse it for this error. The question is; did the court have jurisdiction over the parties at the time it rendered the deficiency decree; for if it did, no matter how irregular or erroneous its judgment may be, it must stand until it is reversed. This position is sustained by a long line of authority in the United States Courts and in the Supreme Courts of the several States There is no principle in equity which is better established or upon which the decisions are more in harmony.

But First; The court had jurisdiction because it continued the case by special order, and kept the parties in court, and if the parties were in court it is not necessary to argue that the court had jurisdiction. In the decree *nisi* this order was inserted:" this cause do stand continued until the execution of this decree, and the further orders of this court." If the first part of this order "stand continued until the execution of this decree." refers to the sale and confirmation, then the last part of the order "and for the further order of this court" must refer to what was contemplated by Rule 92 to-wit; a decree for a deficiency, if any. This order was sufficient to keep the parties in court and they are compelled at their own risk to watch the proceedings until they are properly dismissed from court.

It will not be disputed that the court has the power to retain the parties in court to give further relief contemplated by the decree or the rules. Hence the failure to give notice to Ellery of this motion for a deficiency decree, at most, can be only an error, which

might be corrected on an appeal. But it is insisted that this order of continuance only kept the parties in court until the next term, at which time the foreclosure sale was confirmed. No authorities are cited to sustain this position. We understand that an order of this kind *keeps the parties in court until the relief contemplated by the decree or the rules is fully executed, or the parties are properly dismissed.* Often the decree of confirmation is not entered until more than one term is elapsed, but it will not be seriously urged that thereby the parties are discharged, and cannot be bound by the decree. The decree for deficiency is perfectly analogous to it, and the jurisdiction rests on the same grounds.

The Supreme Court in the case of Chicago R. R. Co. vs. Fosdick, 106 U. S. 46, has recognized the right of the Circuit Court to enter the deficiency decree after the term at which the original decree was rendered. In this case the original decree was rendered at the October term on the 5th of December, 1876, and the decree of confirmation, at the March term, on April 12th, 1877, and the decree for a deficiency at the October term, on November 19th, 1877.

In the case Union Life Ins. Co. vs. Hanford, etc., et. al., 27 Fed. Rep't page 588, the foreclosure decree was rendered at the May term, on May 10th, 1879, and the deficiency decree at the October term, on October 27th, 1880, nearly a year and a half afterwards. Both of these cases were decided in the United States Circuit Court for the Northern Dis-

trict of Illinois, in which the terms of Court are held as follows: first Monday in March, May, July and October, and third Monday in December, in each year.

In 93 U. S. 199-206, Ober vs. Gallager the Court says: "Having obtained rightful jurisdiction of the parties and the subject matter of the action for one purpose, the Court will make its jurisdiction effectual for complete relief. Having obtained jurisdiction for one purpose it may be retained for all within the general scope of the equities to be enforced."

2d. The deficiency decree is in execution of the relief contemplated by the original decree, and incident to it, hence the proceedings are pending, and parties are not dismissed from court until after it is rendered.

In Ayres vs. Wiswall 112 U. S. 187, the Court says: "There is here but one cause of action. The personal decree which is asked against Wiswall is incident to the main purpose of the suit. It presents no separate cause of action."

In Chicago vs. Fosdick 116 U. S. 46 on page 83, the Court considering the decrees of conrfimation and deficiency says: "It is contended by the appellees, that, as these decrees are merely orders in execution of the previous decrees of the Court, they are therefore not final in the sense necessary to authorize an appeal, and that consequently as to them the present appeal must be dismissed for want of jurisdiction." The Court assents to the first part of this statement, but held according to the rule sanc-

tioned in Forgay vs. Conrad, 6 How, page 207, and Blossom vs. R'y Co., 1 Wall, 655, that appeals lie from such decrees, and that as the original decree was reversed, that the confirmation and deficiency decrees are left without support, and fall of themselves by reason of that reversal, vitiated by the common error.

3d. *No notice by the rule is required, therefore no notice is necessary.*

If the Supreme Court had intended that notice of the motion for a deficiency decree should be given to the defendant, it seems to us reasonable, that it would have prescribed it in the rule. The decree in nearly every case is a simple matter of calculation, and merely "incident" to the main purpose of the suit, and follows as a matter of course.

Appellee ingenuously avoids stating what kind of notice would be required. It cannot be original process of subpœna in chancery, or summons, because the defendant was out of the territorial jurisdiction of the Court.

If it was mere formal notice to his attorney, it was impossible to give this, because at the time the original decree was entered, Ellery's attorney had been discharged. In his deposition he says: "My object in employing Hall & Baldwin to appear for me in the foreclosure proceedings was as I have stated, merely that they might obtain for me such delay as they could, after which their engagement ceased." See Record page [illegible].

If it was formal notice by letter to the defendant, the failure to give the same, at the most, would be an irregularity. Where the rule does not require notice it cannot be insisted on as a matter of right.

In case of Bank vs. White, 8 Peters 262, the construction of Rule 20 as to the necessity of notice where it is not prescribed, presents a case analogous to the case at bar.

On page 269, the court says: "By the terms of the rule no service of any copy of an interlocutory decree taking the bill *pro confesso* is necessary before the final decree: *and therefore cannot be insisted on as a matter of right or furnish a proper ground for a bill of review.* If the Circuit Court should as a matter of favor and discretion enlarge the time for an answer, or require the service of a copy for a final decree that may furnish a ground why the Court should not proceed to a final decree until such order was complied with. But any omission to comply with it, would be a *mere irregularity in its practice.*"

In Walden vs. Craig, 14 Peters 151-155. The Court permitted an extension of the demise after judgment without notice. On page 154: "The question may be considered whether there having been no notice the amendment must be considered as void. If it is only erroneous and voidable, the Circuit Court erred in rejecting the evidence. It is admitted that the service of process or notice is necessary to enable a Court to exercise jurisdiction in the case, and if jurisdiction be taken where there has

been no service of process or notice the proceeding is a nullity. It is not only voidable but it is absolutely void. But it is only where original jurisdiction is exercised and not a decision on a collateral question where the parties are before the Court. * * * However convenient the practice and indeed necessary to some extent to preserve from prejudice the rights of the parties, notice in such cases may be; still it is a *question of practice.* It does not go except under a positive rule to the exercise of the power of amendment by the court. After the judgment the parties are still in Court for all the purposes of giving effect, and in actions of ejectment the Court having the power to extend the demise after judgment, the defendant may be considered in Court on this motion to amend as well as in any other motion or order which may be necessary to carry into effect the judgment." The court seems to place its ruling on this principle. If the Court has the power to grant the relief after judgment, it may proceed without notice to make a binding order, and the exercise of this power, is in no correct sense similar to an exercise of original jurisdiction between parties on whom original process has not been served.

4th. Ellery was not entitled to notice because he was in default when the foreclosure decree was rendered. Jones on mortgages. (Second Edition,) Sec. 1509, last paragraph was: "When the person liable for deficiency does not appear in the cause, it is the practice after calculation of the amount, to award execution for the deficiency without giving him notice of the motion." This is fully sustained by the case of

White vs. Zust, 28 N. J. Eq. 107-110 decided on appeal. If this is the law how much less was Ellery entitled to notice, when he confesses that he only sought the jurisdiction of the Federal Courts for the purpose of obtaining all the delay possible, being in default, when the foreclosure decree was rendered, and discharging his attorneys as soon as they could no longer delay proceedings. Certainly it is inconsistent with equity that six years afterwards he should ask the court to set aside its solumn adjudication because the privilege of notice was not extended to him.

5th. Granting that the court committed an error in not giving Ellery notice of the application for the deficiency decree, the complainant is not entitled now to have the decree annulled or its execution enjoined. Equity will not annul a judgment or decree for irregularities or errors. It is only where the decree is obtained through fraud, or the court had no jurisdiction to render same, that a Court of Equity in proceedings of this kind will proceed to vacate or enjoin its own solemn adjudications or the adjudications of another court.

The rule may be stated thus: If the court having obtained original jurisdiction over the parties and having *power* to make the order or render the decree, complaint of it will not afterwards in a proceeding of this kind annul its adjudication, because of an erroneous exercise of this power, or because of any errors or irregulatities in its practice, but will leave the parties to appeal. This principle is sustained by an unbroken line of authorities in the Federal decisions

and in the decisions of the Supreme Court of every State in the Union. We know of no case where the rule is stated with greater force and clearness than in the case of Voorhies vs. Bank, 10 Peters, 449. On page 475 Judge Baldwin says: "The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court or may be declared a nullity, collaterally when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In one case it is a record importing absolute verity, in the other mere waste paper, there can be no middle character assigned to judicial proceedings which are reversible for error. Such is their effect, between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution."

Harney vs. Tyler, 2 Wall 328. On page 341: "The general rule is that every presumption not inconsistent with the record is to be indulged in favor of their jurisdiction, and their judgments however erroneous cannot be questioned when introduced collaterally, unless it be shown affirmatively that they had no jurisdiction of the case." On page 342, court says: "That whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid however erroneous they may be, until they are reversed on error or set aside by some direct proceeding for that purpose."

85. Ind., 309, Krug vs. Davis, similar language is used in the syllabus to the case." "A proceeding to enjoin a judgment is a collateral attack and cannot be maintained on account of errors or irregularities merely, but only upon a showing that the judgment is void." The same was held in 44 Iowa, 330, Ins. Co. vs. Highsmith.

Kempe vs. Kennedy, 5 Cranch, 173.

Ex-parte Watkins, 3 Peters, 193.

Grignon vs. Aster, 2 Howard, 319.

Gudnor vs. Jenkins, 14 Mo., 58.

Boyd vs. Chesapeake, 17 Md., 195.

Drake vs. Hanshaw, 47 Iowa, 291.

The case of Jenkins, vs. Easterly, 22 Wis., 128-131 is almost precisely in point. On the coming in of a Referee's report notice of motion for a judgment should have been given, but the court held that the failure to give same was a mere irregularity and that the party should have applied by motion to the Circuit Court to set it aside. After the case was affirmed the appellant made this motion in the Circuit Court and on a second appeal the Supreme Court held that the motion being filed more than one year after the judgment was rendered, it was too late. See 11 How, Pr. 91, Patterson vs. Graves, Jones vs. U. S. Slate Co., 16 How, Pr., 129.

We submit that the failue of Scott, in the foreclosure proceedings in the United States Circuit Court, at Des Moines, to notify Ellery of the motion made

for the deficiency decree, is not a sufficient equitable ground to set aside that decree, or to hold that it is null and void.

H. Scott Howell,
William C. Howell,
Solicitors for Appellant.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 117.

EVELINE SCOTT, Executrix, Estate H. H. Scott, Deceased, *Appellant*,

vs.

CORNELIA ELLERY, Administratrix, Estate Geo. H. Ellery, Deceased, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF OF THE ARGUMENT FOR APPELLEE.

E. S. Huston,
For Appellee.

ACRES, BLACKMAR & CO., PRINTERS, BURLINGTON.

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BRIEF OF THE ARGUMENT FOR APPELLEE.

E. S. HUSTON,
For Appellee.

Three general questions are here for consideration:

(1.) The jurisdiction and power of the court, under equity rule 92, to enter a deficiency decree, under the circumstances of this case, and without notice;

(2.) A construction of section 5105, Revised Statutes of the United States; and

(3.) An election by the appellant in this case, to prove his claim in the court of bankruptcy, thereby waiving any right to proceed further in the court in which he obtained his original decree of foreclosure.

It is important to carry in mind a few dates.

June 10, 1878, the original decree of foreclosure was entered in the case of Scott *vs.* Ellery, in the Circuit Court for the District of Iowa, at Des Moines.

August 31, 1878, a petition in involuntary bankruptcy was filed against Ellery in the District Court of New Jersey; October 1, 1878, he was adjudged a bankrupt; October 23, 1878, his estate was conveyed to the assignee, and February 25, 1879, he was discharged as a bankrupt.

November 4, 1878, at the October term, 1878, the sale under the foreclosure decree was confirmed.

February 23, 1879, Scott filed his proof in the bankruptcy court for the balance unpaid of the original decree. (See printed transcript, page 19.)

May 15, 1879, at the May term, 1879, a deficiency decree was entered.

I.

Equity rule No. 92, is as follows: "In suits in equity, for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the territories, having jurisdiction of the same, a decree may be rendered for any balance found due to the complainant, over and above the proceeds of the sale, or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money."

The adoption of that rule was doubtless the direct result of the holding by this court in the case of Noonan *vs.* Lee, 2 Black, 499, that, in the absence of such a rule, it was not competent for the Circuit Court, in entering a decree of foreclosure, to provide for general execution for the deficiency, if any.

The point we urge is that rule 92 did not, and could not, confer jurisdiction to enter a deficiency decree, after the cause had once passed out of the jurisdiction of the court, but the rule was intended to confer a power on the court, which it did not previously possess, with regard to a suit then pending, and over which, parties and subject matter, it still had jurisdiction.

A consideration of this question, therefore, requires that attention be directed to some additional facts in the record. The original foreclosure decree contains no provision for, or reference to, a possible deficiency. (See printed transcript, pages 17 and 18.)

The decree concludes as follows:

"And that this cause do stand continued until the execution of this decree and the further order of this court."

At the next succeeding term (October term, 1878), on the 4th day of November, an order confirming the sale was duly entered, on motion of complainant (printed transcript, page 25), and this order contains no other or further order, retaining the cause for any purpose whatever.

At the next succeeding term (May term, 1879), on the 15th day of May, 1879, on motion of complainant, the cause was taken up and a decree entered against the de-

fendant therein for $10,436,42, (see printed transcript, page 22) and these are the only orders or decrees entered in said cause, after the original decree. (See the certificate of the clerk to that effect on page 25 of the printed transcript.) The deficiency decree was entered, without any notice, whatever, being served on defendant, or his counsel. (See agreed statement of facts, printed transcript, page 15.)

In Brooks *vs.* Railroad Company, 102 U. S., 107, it is said:

"At the end of the term the parties are discharged from further attendance in all cases decided, and we have no power to bring them back."

In Sibbald *vs.* U. S., 12 Pet., 488, on page 492, the court says:

"No principal is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgment, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes."

This language is quoted approvingly in Phillips *vs.* Negley, 117 U. S., 665, to which is added on page 674:

"From which it follows that no change or modification can be made which may substantially vary or affect it in any material thing."

It was said in Beebe *vs.* Russell, 19 How., 283:

"When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. It is true a decree may be final, although it directs a reference to a master, if all the consequential directions depending upon the result of the master's

report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the full and entire benefit of the previous decision of the court."

It will be observed that this language is directly applicable. No further questions for the future judgment of the court were reserved, and it was not necessary to bring the cause again before the court. It was the right of the complainant, by proper proceedings, to reserve the question and case for a further decree for a deficiency, if one should be ascertained to exist, but this was a right which the complainant could waive, and it seems to us, must be presumed to have waived, as he made no provision for it in the original decree.

The proceedings to foreclose a mortgage are purely equitable, and in the absence of statute, the State Courts, and prior to the adoption of Equity rule 92, United States Courts, had no power in such proceedings to award execution for any deficiency.

Hence, the relief granted in this case by the original decree was complete in itself, and as it contained no provision for ascertaining the deficiency, if any, as it might and should, if it was to be claimed, (McCarthy *vs.* Graham, 8 Paige, 480) we insist it was final in every sense, and defendents were out of court for any and every other purpose, save only the enforcement of the decree itself, according to its terms.

That the decree of foreclosure was a final decree, will scarcely be disputed. In Sheffer *vs.* Bank, 33 Fed. Rep., 315, Johnson, Circuit Judge, says on page 317:

"It is obvious that this decree determined the rights of the parties, and was, in effect, a decree of foreclosure of mortgaged premises, leaving nothing to be done except to execute its provisions. Such a decree has always been held by the legal tribunals, to be a final decree."

This language was used in determining whether the court had power, at a succeeding term, to entertain a petition for re-hearing, and is, therefore, directly in point under the rule announced in Sibbald *vs.* U. S., *supra.* (See also Morgans Company *vs.* Railway Co., 32 Fed. Rep., 525, where Mr. Justice Harlan repeats the principle, citing numerous authorities, and applying it to a case where the court undertook, in effect, to modify a decree after appeal allowed and perfected.)

In Daniels Chancery Practice, 5th Edition, Vol. 2, on page 993, it is said:

"When a decree does not adjourn the consideration of the cause, it is said to be a final decree."

And further, on the same page:

"It is to be observed that the reservation of further consideration is not confined to the first decree, *but will be repeated in every decree in which it may be necessary to direct an inquiry.* It is also to be observed that after such a reservation, the court will not interfere upon the matter reserved in a summary way, but will require the case to be set down for hearing."

Again, on page 1366, the same author says:

"Where accounts or inquiries have been directed, the decree at the original hearing adjourns the further consideration of the cause, and in order to obtain a final decree, the cause must be set down to be heard on further consideration."

And again, on page 1368:

"In general, if the case is such as will admit of it, the court will, upon the first hearing on further consideration, make a final decree. * * * If any further inquiries are necessary, the court will take this occasion to direct such further inquiries, *adjourning again the further consideration of the cause, and this it will repeat as often as may be necessary.*"

And on page 1373:

"Notice that a cause has been set down on further consideration, or the summons for the further consideration thereof, must be served on any person who has been served with notice of the decree and has obtained an order for leave to attend proceedings, as well as on the parties named on the record."

It seems to us clear, therefore, that when the order of confirmation of sale was entered at the October term, 1878, without further reservation, the jurisdiction of the court over these parties and the cause ended. There must be a period in the history of a case when the parties have a right to go out of court, and that time must be when a final decree has been entered, and no further reservation made of the cause. If this be true, then the case is at an end; for the court was absolutely without jurisdiction or power to act, at the time when the deficiency decree was entered. It will be observed the clerk certifies no other or further order was made. (Printed transcript, page 25).

In Winzer *vs.* McVeigh, 93 U. S., 274, it is said, on page 282:

"The doctrine invoked by counsel that where a court has once acquired jurisdiction, it has a right to decide

every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but like all general propositions, is subject to many qualifications in its application."

And again, on page 283:

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

The precise question here under consideration was raised and decided in the case of Johnson *vs.* Anderson, 76 Va., 766. The suit was brought upon a deficiency decree rendered in Ohio in 1880, without notice, the original decree having been entered in 1868.

(Of course, if such a decree may be entered six months or a year after the entering of the original decree of foreclosure, we see no reason why it might not be entered five, ten and even twelve years after, as was done in the case which is cited.)

The Virginia court held the deficiency decree void, saying among other things:

"This is the decree relied on by appellant, and we are of the opinion that it is void, because the court had no jurisdiction to render it. The decree of June 22, 1868, was a final decree. It confirmed the sale to Johnson and ordered the land to be conveyed to him. It is true the court in that decree, as it did in the decree of July, 1880, might have formally applied the money, and ordered the payment of the balance due on the last note, but it did not. It had evidently given all the relief in the case contemplated. The cause was

ended and the court could proceed no further. It had no further jurisdiction in that proceeding, either of the subject matter or of the parties. It would seem that the decree of July, 1880, was rendered in the absence of the defendant, upon the mere motion of the plaintiff by his attorney, and without notice to anybody. The original cause being ended, the proceeding was a new one against the defendant, and being had without notice, the personal decree against him is a nullity, and would be so treated, we presume, everywhere."

A similar question was raised in Grant *vs.* Griswold, 21 Hun., 509, the court holding that a decree of foreclosure is one thing complete in itself, and that a decree *in personam* is a new and distinct proceeding.

In Michigan a statute exists which is in substance quite like Rule 92, being paragraph 6720, Howell's Statutes, as follows:

"When a bill shall be filed for the foreclosure of a mortgage, the court shall not only have power to decree the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied, after a sale of the mortgaged premises, in the cases in which such excess is recoverable by law, and for that purpose may issue the necessary executions as in other cases, against other property of the mortgagor."

It will be observed that this statute, as rule 92, is absolutely silent with respect to notice.

In Ransom *vs.* Sutherland, 46 Mich., 489, the court says:

"It is not absolutely essential that the application (for a deficiency decree) take the form of a petition,

but it should be in writing, under oath, and should be served on the party against whom execution is sought, with notice of the time when it will be presented. The service should be on the defendant in person, wherever that is practicable; for presumtively, the retainer of a solicitor in a cause does not extend to proceedings taken subsequent to the decree, for its enforcement. If personal service on the defendant is impracticable, the court on a showing of the facts may direct a substituted service."

The same court had previously said in Brown *vs* Thompson, 29 Mich., 72:

"The proceeding for a further decree, upon an additional installment, after payment of a prior decree, is essentially a new suit, in all except form, and notice is required to every person whose interests are to be affected, as in an original suit, and service of process must be made as in an original suit."

And in Johnson *vs.* Shepard, 35 Mich., 115, it was held that the proceeding for deficiency is essentially new and supplementary, and not a mere continuation of the foreclosure, likening the proceedings to those required to enforce payment of a new installment falling due, after the decree and sale for a prior one.

The doctrine of these cases was cited and reaffirmed in McCrickett *vs.* Wilson, 50 Mich., 513.

In Symns *vs.* Noxon, 45 N. W. Rep., 680, a case in the Supreme Court of Nebraska, an attempt had been made, after a final decree, to open and enlarge it without notice. The court says:

"After a final decree is rendered in a case, a change or modification, even if made at the same term, must be upon notice to the adverse party. This is necessary to protect the right of all of the parties to the action.

After the expiration of the term at which a judgment is rendered, the discretion of the court over its own judgment ceases, and thereafter must be governed by fixed principles of law."

Many facts and circumstances may, and often do, exist which would make it inequitable for a court to award general execution for a deficiency, as is well illustrated in the cases of Phelps *vs.* Loyhed, 1 Dillon, 512, and Union Mutual Life Insurance Co. *vs.* Hanford, 27 Fed. Rep., 588, but it is clear if no such decree is asked for originally, and no provision is made therefor in the original decree, and the cause is not retained for further consideration, the defendant is not called upon to disclose these facts and circumstances, which would constitute no defense to the foreclosure.

II.

We come now to the other branch of the case.

Section 5105 of the Revised Statutes of the United States, reads as follows:

"No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt, shall be deemed to be discharged and surrendered thereby."

We are unable to find that this court has ever had occasion to consider this section, with a view to its application to a case such as we have here.

In Boynton *vs.* Ball, 121 U. S., 457, section 5106 was carefully considered, and it was there held that the pro-

visions of that section were for the benefit of the bankrupt, and that he could waive them, and would be presumed to have done so if he failed to set them up, but it is clear that decision cannot control here, for that section expressly provides that any such suit shall be stayed *upon application of the bankrupt*, and it is said in Hill *vs.* Harding, 107 U. S., 631, on page 633:

"If neither the bankrupt or his assignee applies for a stay of proceedings, the court may of course proceed to judgment. The stay does not operate as a bar to the action, but only as a suspension of proceedings, until the question of the bankrupt's discharge shall have been determined."

But the distinction between cases arising under section 5106, and those under 5105 is plain: The former section applies to cases where the demand of the creditor is *provable, but not proved;* the latter to cases where the demand is not only provable, but *has been proved.*

It will be observed that section 5105 does not require any application or affirmative act by the bankrupt, but the provision is, that by mere act of the creditor alone, in proving his claim, all proceedings already commenced *shall be deemed to be discharged and surrendered thereby.*

A comparison of section 5105 with section 5, chapter 9 of the Bankrupt Act of 1841, will show that they are substantially the same, at least upon this particular point. The effect of the latter section was considered by Judge Ware in the District Court for Maine, in the case of Everett *vs.* Derby, 5 Reporter, 225, in which he says:

"When a suit has been commenced for the recovery of debt, before the proof is made under the decree in

bankruptcy, the proving of the debt operates as a surrender *ipso jure* of the action, and is a bar to any further proceedings in that suit."

The question was very fully considered by Chancellor Walworth, 2 Barb. Chy., 506, where he reviews the history of the bankruptcy laws both of England and the United States. He says, on page 527:

"The fifth section of our bankrupt act of 1841, appears to have been framed with a view to obviate some of the difficulties which had arisen under the English bankrupt laws. For, instead of prohibiting a creditor from coming in and proving a debt, under the proceedings in bankruptcy, until he should have relinquished any suit which he had previously instituted for the recovery of that debt, as he is bound to do in England, this section of our act, of 1841, declares that the mere act of proving a debt under the proceedings in bankruptcy, shall, of itself, be deemed a surrender of all proceedings already commenced, and of all unsatisfied judgments already obtained on such debt. And, instead of declaring the proof of the debt to be an election by the creditor to take the benefit of the proceedings in bankruptcy, in respect to such debt, our statute declares that no creditor, or other person coming in and proving his debt or other claim, shall be allowed to maintain any suit in law or equity therefor; but shall be deemed thereby to have waived all right of action and suit against such bankrupt."

Most of the authorities cited and quoted from by us under the 3d division of this brief, will be found to be directly applicable under this division, also.

On the hearing in the court many cases were cited by complainant, especially Eyster *vs.* Gaff, 91 U. S., 521, and Dimock *vs.* Revere Copper Co., 117 U. S., 559, as being in opposition to our views, but an examination of these

cases will show they are not in point for several reasons, notably: (1) the creditors had not proved their demands in the bankrupt court, and thereby made themselves parties to the bankruptcy proceedings, and therefore (2) a proper, or indeed any, consideration of section 5105, was not involved in those cases, or any of them.

III.

We claim that Scott, having proved his claim in the court of bankruptcy, thereby elected to undertake the collection of the balance due him under the bankruptcy proceedings, that such an act was inconsistent with the further prosecution of the case in the Circuit Court of Iowa, and that his attempt to do so without notice, under the circumstances of this case, amounted to a fraud for which the complainant is justly entitled to the relief granted him by the court below.

In Dingee *vs.* Becker, 9 N. B. R. 508, it is said:

"Having made himself a party to the bankruptcy proceedings by proving his debt there, he could not lawfully pursue the defendant by an execution from this court for the same debt, while the bankrupt's application for a discharge is pending."

The question was before the Supreme Court of Massachusetts in the case of Bennett *vs.* Goldwaithe, 109, Mass., 494, where the court says:

"A provision substantially similar (to Section 5105), derived from the English bankruptcy acts, was inserted in the United States bankruptcy act of 1841, chapter 9, section 5, and its effect was uniformly considered to be, that proof of a debt in bankruptcy was a full and con-

clusive bar, at least to any action or suit already brought thereon. (Citing other cases). * * * The intention of congress would seem, at least, to have been, to hold any general creditor who elects to take the benefit of commission in bankruptcy, to thereby have abandoned any judicial proceedings instituted upon the same debt, which might give him a priority or advantage over other creditors, against the bankrupt or his property."

And, again, in Cook *vs.* Coyle, 113 Mass., 252, where the court says:

"*The fact of proof in bankruptcy defeats and annuls the suit* and the attachment made therein. * * * He surrendered his right to prosecute this action when he proved his claim and procured it to be allowed in the District Court of the United States under the proceedings in bankruptcy."

The effect of section 5105 was also considered by the Supreme Court of Colorado in Brooks *vs.* Bates, 4 Pac. Rep., 1068, where the court says, on page 1071:

"We shall simply adopt the conclusion reached in Dingee *vs.* Becker, 9 N. B. R., 508, interpreting this provision in the light of the entire act. If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion, the creditor who has proved his debt is still incapable of proceeding elsewhere without permission of the court of bankruptcy. The reason of this construction is, that under the law the creditor who proves his claim in bankruptcy proceedings, thereby voluntarily submits to the jurisdiction of the bankruptcy court, and waives any right that he might have had to maintain, upon his own volition merely, a suit elsewhere."

This precise question was also considered in Haxtun *vs.* Corse, 2 Barb. Chy., 506, where the court says on this point, on page 530:

"I conclude, therefore, notwithstanding the general language contained in the fifth section of the act, the law makers did not intend that the proving of debts by creditors should be an absolute abandonment of all claims against the future acquisitions of their debtor, if his discharge was refused, or if it was void for any of the frauds specified in the act, but merely that the proving of debts under the decree should be considered as a waiver of the right of the creditors to institute any suits or proceedings at law or in equity, which were in any way inconsistent with the election of such creditors to obtain satisfaction of their debts out of property of the bankrupt under the decree; and as a consent to be bound by the discharge in case the bankrupt should obtain one which was not impeachable for fraud or willful concealment of his property."

The court will observe that some of the authorities cited under the first subdivision of this brief clearly indicate that the proceedings to obtain judgment for a deficiency, at least under the facts of this case, are equivalent to the institution of a new suit or proceeding.

This section 5105 received careful consideration by Judge Blodgett, in the Circuit Court for the Northern District of Illinois, in the case of Hall *vs.* Greenbaum, 33 Fed. Rep., 22. Section 23, chapter 83, Revised Statutes of Illinois, provides that when the commencement of an action is stayed by injunction, or order of a judge or court, or a statutory prohibition, the time of the continuance of the injunction or prohibition, is not part of the time limited for the commencement of the action; and the question was whether section 5105 amounted to such prohibition, and therefore suspended the limitations, under the provisions above referred to. In the opinion, the court says:

"It is urged that the bankrupt merely has the privilege of insisting upon a stay of proceedings at law, pending his bankruptcy proceedings, and that may be true in regard to cases under the provisions of section 5106, but clearly such was not the intention of congress in regard to cases coming within the provisions of section 5105, as now amended. * * *

The language of the bankruptcy law is:

"No creditor proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor, against the bankrupt, etc. This is clearly a peremptory and positive prohibition against the maintenance of a suit against the bankrupt, by a creditor who has proved his debt."

The court reached the conclusion, which is substantially the same as that reached by Judge Ware, in the Maine case, under the old bankruptcy law, that this section 5105 operated *ipso jure*, that no act of the bankrupt was necessary, that it operated itself as a bar, and therefore, suspended the operation of the Statute of Limitations for Illinois, under the provisions above referred to.

IV.

We think no question will be raised in this court, that we have not pursued the appropriate remedy. In Phillips *vs.* Negley, 117 U. S., 665, this court says, on page 674:

"It is equally well established by decisions of this court, that the appropriate remedy for relief against judgments at law wrongfully obtained, is by a suit in equity."

We respectfully submit that upon either of the grounds above presented, the decree of the court below was right, and should be affirmed.

E. S. HUSTON,
For Appellee.